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THE  
**ONTARIO LAW REPORTS**

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CASES DETERMINED IN THE COURT OF APPEAL  
AND IN THE HIGH COURT OF JUSTICE  
FOR ONTARIO.

**1907.**

REPORTED UNDER THE AUTHORITY OF THE  
LAW SOCIETY OF UPPER CANADA.

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**VOL. XIII.**

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JUDGES  
OF THE  
COURT OF APPEAL

DURING THE PERIOD OF THESE REPORTS

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OF THE  
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During Hilary Term, 1907, the following gentlemen were called to the Bar:—

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During Easter Term, 1907, the following gentlemen were called to the Bar:—

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## ERRATA.

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Page 10, headlines, for "sec. 152, sub-sec. 62," read "ch. 152, sec. 62."

Page 265, line 4, for "*Robertson v. The Queen*," read "*The Queen v. Robertson*."

Page 471, headlines, for "sec. 8," read "sec. 9, sub.-sec. 8."

Page 479, line 4, head note, for "i" read "1."

Page 548, head note, line 3, for "giving away," read "giving way."



## CASES REPORTED.

A.		Canadian Oil Fields Co. v.	
Adams v. Fairweather (D.C.)	490	Village of Oil Springs (D.C.)	405
Ameliasburgh, The Corporation of the Township of, v.		Canadian Pacific Railway, The, Burtch v. .... (D.C.)	632
Pitcher et al., Re ... (D.C.)	417	Canadian Pacific R.W. Co., Booth v. .... (D.C.)	91
Armstrong, Schaeffer v. .... (D.C.)	40	Carter v. Hunter. ....	310
		Carton v. Wilson. ....	412
B.		Clarke v. Union Stock Underwriting Co. .... (D.C.)	102
Baxter v. Gordon Ironsides & Fares Co., Ltd. .... (D.C.)	598	Cohen et al., Kerstein et al. .... (C.A.)	144
Bell and the Municipal Corporation of the Township of Elma, Re. .... (D.C.)	80	Corporation of the City of Toronto, The Burns v. (Ch.)	109
Biggar et ux. v. Township of Crowland. ....	164	Corporation of the City of Toronto, The, v. The Grand Trunk R.W. Co. et al. .... (D.C.)	12
Bohan v. Galbraith... (D.C.)	301	Corporation of the Town of Dundas, The, Cummings v. .... (D.C.)	384
Booth v. Canadian Pacific R.W. Co. .... (D.C.)	91	Corporation of the Township of Ameliasburg, The, v. Pitcher et al., Re ... (D.C.)	417
Boyd v. Marchmont.... (Ch.)	468	Corporation of the Township of Malahide, Leslie v. (C.A.)	97
Brenner v. Toronto R.W. Co. .... (D.C.)	423	Corporation of the Township of Tilbury North, The, Burke v. .... (D.C.)	225
Brown, International Text Book Company, v.... (D.C.)	644	Corporation, Municipal, of the Township of Elma and Bell, Re. .... (D.C.)	80
Burk v. Ferguson, Rex ex rel.	479	Corporation, The Municipal, of the Township of Osgoode and McKenna, In re. (C.A.)	471
Burke v. The Corporation of the Township of Tilbury North. .... (D.C.)	225	Corporation, Municipal, of the Village of Watford et al., The, McGregor v. ....	10
Burns v. The Corporation of the City of Toronto.. (Ch.)	109	Crawford v. Tilden.... (D.C.)	169
Burns v. Toronto Railway Co. .... (Ch.)	404	Crichton, Re. .... (D.C.)	271
Burr, The King v. .... (C.A.)	485	Crowland, Township of, Biggar et ux. v. ....	104
Burtch v. The Canadian Pacific Railway. .... (D.C.)	632	Cummings v. The Corporation of the Town of Dundas. .... (D.C.)	384
Byers v. Kidd. ....	396		
C.			
Canada Fire Ins. Co., The, London & Western Trust Co., v. .... (D.C.)	540		
Canadian Coloured Cotton Mills Company, The, Vano v. .... (Ch.)	421		

D.	H.
Dawson, Gyorgy v. .... 381	Hanly et al. v. Michigan Central R.W. Co. .... (C.A.) 560
Dominion Express Co., F. T. James Co. v. .... (D.C.) 211	Hart Estate, Re. .... (Ch.) 379
Driffill v. Ough. .... 8	Hastings, Still v. .... (D.C.) 322
Dundas, The Corporation of the Town of, Cummings v. .... (D.C.) 384	Hudson's Bay Co. v. Town of Kenora. .... 237
	Hunter, Carter v. .... 310
E.	I.
Elma, the Municipal Corporation of the Township of, and Bell, Re. .... (D.C.) 80	Independent Cordage Co. of Ontario, Ltd., The, and The King. .... 619
Empey v. Fick. .... (D.C.) 178	International Text Book Co. v. Brown. .... (D.C.) 644
Engeland et al. v. Mitchell et al. .... (D.C.) 184	
F.	J.
Fairweather, Adams v. (D.C.) 490	James Co., F. T., v. Dominion Express Co. .... (D.C.) 211
Fallis v. Wilson. .... (Ch.) 595	
Federal Life Assurance Co. of Canada v. Stinson et al. .... (C.A.) 127	K.
Ferguson, Rex ex rel. Burk v. 479	Keewatin Power Co. v. Town of Kenora. .... 237
Fick, Empey v. .... (D.C.) 178	Kennedy, Preston v. .... (C.A.) 17
Fleuty v. Orr. .... (D.C.) 59	Kenora, Town of, Hudson's Bay Co. v. .... 237
Foresters, Independent Order of, Zilliax v. .... 155	Kenora, Town of, Keewatin Power Co. v. .... 237
G.	Kerstein et al. v. Cohen et al. .... (C.A.) 144
Galbraith, Bohan v. .... (D.C.) 301	Kidd, Byers v. .... 396
Gamble, Re. .... 299	King, The, and The Independent Cordage Co. of Ontario, Ltd. .... 619
Gardner, Gibson v. .... (C.A.) 521	King, The, v. Burr. .... (C.A.) 485
George v. Green. .... (D.C.) 189	
Gibson v. Gardner. .... (C.A.) 521	L.
Goold, Reid v. .... (Ch.) 51	Lake Huron and Manitoba Milling Co., Northern Elevator Co. v. .... (C.A.) 349
Gordon Ironsides & Fares Co., Ltd., Baxter v. .... (D.C.) 598	Leckie et al., McIntosh v. .... 54
Grand Trunk R.W. Co., The, et al., The Corporation of the City of Toronto, v. .... (D.C.) 12	Leslie v. Corporation of the Township of Malahide. .... (C.A.) 97
Green, George v. .... (D.C.) 189	Livingston v. Livingston. .... (D.C.) 604
Guelph and Goderich R.W. Co., The, Symon v. .... (Ch.) 47	London and Western Trust Co. v. The Canada Fire Ins. Co. .... (D.C.) 540
Gunn v. Turner. .... (D.C.) 158	
Gyorgy v. Dawson. .... 381	



London and Western Trusts Co., The, v. Loscombe et al. .... (D.C.)	34
Loscombe et al., The London and Western Trusts Co. v. .... (D.C.)	34
Lovell v. Lovell.. (C.A.)	569, 587

## M.

Macdonnell, Thomson & Avery v. .... *	653
Maccoomb et al. v. Town of Welland..... (C.A.)	335
Malahide, Corporation of the Township of, Leslie v. .... (C.A.)	97
Marchmont, Boyd v..... (Ch.)	468
Michigan Central Railroad Co., The, Schwoob v. (C.A.)	548
Michigan Central R.W. Co., Hanly et al. v. .... (C.A.)	560
Mitchell et al., Engeland et al. v. .... (D.C.)	184
Montgomery v. Ryan... (Ch.)	297
Municipal Corporation of the Village of Watford, The, et al., McGregor v. ....	10

## Mc.

McCormack v. Toronto R.W. Co..... (D.C.)	656
McFarlane v. Greenock School Trustees..... (D.C.)	220
McGillivray et al., Robinson et al. v. .... (C.A.)	232
McGregor v. The Municipal Corporation of the Village of Watford et al.....	10
McIntosh, Smith v..... (D.C.)	118
McIntosh v. Leckie et al.....	54
McKenna and the Municipal Corporation of the Township of Osgoode, In re .... (C.A.)	471

## N.

Northern Elevator Co. v. Lake Huron and Manitoba Milling Co..... (C.A.)	349
---	-----

## O.

Oil Springs, Village of, Canadian Oil Fields Co. v. (D.C.)	405
Ontario Medical Act, In re .... (C.A.)	501
Orr, Fleuty v..... (D.C.)	59
Ough, Drifill v.....	8
Owen Sound, Town of, and Sinclair, Re..... (C.A.)	447

## P.

Patriarche, Ryan v.....	94
Petrakos, In re..... (D.C.)	650
Pettypiece v. Turley... (D.C.)	1
Pitcher et al., Re The Corporation of the Township of Ameliasburgh v..... (D.C.)	417
Port Arthur and Rainy River Provincial Election (No. 3) Re, Preston v. Kenny .... (C.A.)	17
Porter, Re ..... (D.C.)	399
Preston, Re..... (D.C.)	110
Preston v. Kennedy... (C.A.)	17
Preston v. The Toronto R.W. Co..... (Ch.) 78, (C.A.)	369

## R.

Reid v. Gould..... (Ch.)	51
Reid, Taylor v., Re.... (D.C.)	205
Rex ex rel. Burk v. Ferguson.	479
Rex v. Spellman..... (D.C.)	43
Robinson et al. v. McGillivray et al..... (C.A.)	232
Ryan, Montgomery v.... (Ch.)	297
Ryan v. Patriarche.....	94

## S.

Schaeffer v. Armstrong (D.C.)	40
Schwoob v. The Michigan Central Railroad Co.. (C.A.)	548
Sinclair and Town of Owen Sound, Re..... (C.A.)	447
Stephens v. Toronto R.W. Co..... (Ch.) 107, (C.A.)	363
Still v. Hastings..... (D.C.)	322
Stinson et al., Federal Life Assurance Co. of Canada .... (C.A.)	127

Smith v. McIntosh. . . . (D.C.)	118	Township of Crowland, Big-	
Spellman, Rex v. . . . . (D.C.)	43	gar et ux. v. . . . .	164
Symon v. The Guelph and		Turley, Pettypiece v. . . (D.C.)	1
Goderich R.W. Co. . . . (Ch.)	47	Turner, Gunn v. . . . . (D.C.)	158
T.		U.	
Taylor v. Reid, Re. . . (D.C.)	205	Union Stock Underwriting	
Thomson & Avery v. Mac-		Co., Clarke v. . . . . (D.C.)	102
donnell. . . . .	653	V.	
Tilden, Crawford v. . . . (D.C.)	169	Vano v. The Canadian Col-	
Toronto, City of, Toronto		oured Cotton Mills Com-	
Railway Company v. (D.C.)	532	pany. . . . . (Ch.)	421
Toronto General Trusts Cor-		W.	
poration and Wilson, In re		Welland, Town of, Maccoomb	
. . . . . (D.C.)	82	et al. v. . . . . (C.A.)	335
Toronto R.W. Co., Brenner		Wilson and The Toronto Gen-	
v. . . . . (D.C.)	423	eral Trusts Corporation, In	
Toronto Railway Co., Burns		re. . . . . (D.C.)	82
v. . . . . (Ch.)	109, (Ch.)	Wilson, Carton v. . . . .	412
404		Wilson, Fallis v. . . . . (Ch.)	595
Toronto Railway Company v.		Z.	
City of Toronto. . . . (D.C.)	532	Zilliax v. Independent Order	
Toronto R.W. Co., McCor-		of Foresters. . . . .	155
mack, v. . . . . (D.C.)	656		
Toronto Railway Co., Preston			
v. . . . . (Ch.)	78, (C.A.)		
369			
Toronto R.W. Co., Stephens			
v. . . . . (Ch.)	107, (C.A.)		
363			
Toronto, The Corporation of			
the City of, v. The Grand			
Trunk R.W. Co. et al. (D.C.)	12		



## CASES CITED.

### A.

NAME OF CASE.	WHERE REPORTED.	PAGE
Abraham v. Abraham.....	19 O.R. 256, 18 A.R. 436.....	129, 133
Abrath v. North-Eastern R.W. Co.....	11 Q.B.D. 440.....	601
Abrey v. Crux.....	L.R. 5 C. P. 37.....	104
Ackroyd v. Smith.....	19 L.J.C.P. 315.....	55
Adam v. British and Foreign Steamship Co.....	[1898] 2 Q.B. 430.....	382, 383
Aldston v. Old North State Ins. Co.....	80 N.C. 241.....	545
Allan v. McTavish.....	8 A.R. 440.....	232
Allan v. Sundius.....	1 H. & C. 123.....	359
Allegheny Oil Co. v. Snyder.....	106 Fed. R. 764.....	55
Allinson v. General Council of Medical Education and Registration.....	[1894] 1 Q.B. 750.....	282, 614, 615
Alpha Co. Ltd. In re; Ward v. Alpha Co.....	[1903] 1 Ch. 203.....	9
American Grocery Co. v. Sloan.....	68 Fed. R. 539.....	145
Anderson, Doe, v. Todd.....	2 U.C.R. 82.....	258, 259
Anderson v. North British R.W. Co.....	2 Rett. 443.....	218
Andreas v. Canadian Pacific R.W. Co.....	37 S.C.R. 1.....	562
Andrews v. City of London.....	12 P.R. 44.....	364
Anlaby v. Pretorius.....	20 Q.B.D. 764.....	195, 198
Anthony v. Halstead.....	37 L.T.N.S. 433.....	433
Apothecaries Co. v. Greenough.....	1 Q.B. 799.....	503
Apothecaries Co. v. Jones.....	[1893] 1 Q.B. 89.....	513
Appleby v. Turner.....	19 P.R. 145.....	195, 198, 202
Archibald v. McLaren.....	21 S.C.R. 588.....	323, 324, 326, 333
Archibald v. Wright.....	9 Sim. 161.....	2
Armstrong v. The Canada Atlantic R.W. Co.....	4 O.L.R. 560.....	120, 121
Armstrong v. Township of Euphemia.....	7 O.W.R. 552.....	109
Arnold v. Playter.....	14 P.R. 399.....	421
Ashworth v. Redford.....	43 L.J.C.P. 57.....	357
Atwood v. Beirne.....	80 N.Y. 547 (73 Hun.).....	603
Attorney-General v. Cameron.....	26 A. R. 103.....	537
Attorney-General v. Ely, Haddenham and Sutton R.W. Co.....	L.R. 4 Ch. 194.....	537
Attorney-General v. Gaskill.....	20 Ch.D. 519.....	469
Attorney-General v. Perry.....	15 C.P. 329.....	253
Attorney-General v. Scott.....	34 S.C.R. 603.....	247
Attorney-General v. Scully.....	33 S.C.R. 16.....	589
Attorney-General v. Staffordshire County Council.....	[1905] 1 Ch. 336.....	396
Attorney-General v. Sillem.....	10 H.L. Cas. 704, 2 H. & C. 431..	22
Attorney-General v. Stewart.....	2 Mer. 143.....	259
Attorney-General for Ontario v. Attor- ney-General for Canada.....	[1894] A.C. 189.....	129, 171, 174
Attorney-General for Ontario v. The Hamilton Street R.W. Co.....	[1903] A.C. 529.....	509
Attorney-General for Canada v. Attor- ney-General for Ontario.....	[1898] A.C. 247.....	174
Attwater v. Attwater.....	18 Beav. 330.....	400

## B.

NAME OF CASE.	WHERE REPORTED.	PAGE
Babcock v. Standish.....	19 P.R. 195.....	108, 364, 365, 367
Bailey v. Sweeting.....	9 C.B.N.S. 843.....	208
Bajus, Re.....	24 O.R. 397.....	112
Baker v. Harris.....	16 Ves. 397.....	129, 134, 138, 141, 143
Baker v. Yorkshire Fire and Life Assurance Co.....	[1892] 1 Q.B. 144.....	96
Ball v. Crompton Corset Co.....	11 P.R. 256.....	15, 16
Bank of New South Wales v. Owston.....	4 App. Cas. 270.....	599
Bank of Toronto v. Lambe.....	12 App. Cas. 576.....	648
Barnes v. Grant.....	26 L.J. Ch. 92.....	2
Barraclough v. Brown.....	[1897] A.C. 615.....	537, 539
Barrs v. Jackson.....	1 Y. & C. 585.....	527
Barthel v. Scotten.....	24 S.C.R. 367.....	250
Bartlett v. Pentland.....	10 B. & C. 760.....	357
Barwick v. English Joint Stock Bank.....	L.R. 2 Ex. 259.....	600
Baskerville v. Vose.....	15 P.R. 122.....	229
Basso v. Grand Trunk Railway Co.....	6 O.W.R. 893.....	372
Bastard v. Smith.....	10 A. & E. 213.....	13
Bayley v. Manchester, etc., R.W. Co.....	L.R. 8 C.P. 148.....	167
Bazley v. Forder.....	L.R. 3 Q.B. 559.....	418
Beal v. South Devon R.W. Co.....	3 H. & C. 337.....	219
Becher v. Webb.....	7 P.R. 445.....	129, 134, 141
Beckett v. Grand Trunk R.W. Co.....	13 A.R. 174.....	371, 562, 635
Beeman v. Knapp.....	13 Gr. 398.....	179
Beemer v. Beemer.....	9 O.L.R. 69.....	602
Begg v. Toronto R.W. Co.....	6 O.W.R. 239.....	119, 125
Benallack v. The Bank of British North America.....	36 S.C.R. 120.....	233
Beneficed Clerk v. Lea.....	[1897] A.C. 226.....	283
Berry v. Henderson.....	L.R. 5 Q.B. 296.....	503
Bessemer Gas Engine Co. v. Mills.....	8 O.L.R. 647.....	648
Bethune v. Bethune.....	[1891] P. 205.....	577
Bickett v. Morris.....	L.R. 1 Sc. App. 47.....	268
Bigelow v. Bigelow.....	6 P.R. 124.....	614, 617
Bilbee v. The London, Brighton and South Coast R.W. Co.....	34 L.J.C.P. 182.....	635
Black v. Wheeler.....	7 O.L.R. 545.....	229
Blackburn v. McCallum.....	33 S.C.R. 65.....	400, 401, 402
Blaney v. Hendrick.....	3 Wils. 205.....	198, 200
Blewett v. Tregonning.....	3 A. & E. 554.....	499
Booth v. Mister.....	7 C. & P. 66.....	76
Booth v. Trail.....	12 Q.B.D. 8.....	596
Borough of Bathurst v. Macpherson.....	4 App. Cas. 256.....	166
Borthwick v. Walton.....	15 C.B. 501.....	207
Boston v. Lelievre.....	L.R. 3 P.C. 157.....	18
Bourgoin v. La Compagnie du Chemin de fer de Montreal, Ottawa et Occidental R.W. Co.....	5 App. Cas. 381.....	174
Bowes v. Law.....	L.R. 9 Eq. 636.....	408
Bowes v. Shand.....	2 App. Cas. 455.....	355
Bradford v. Roulston.....	8 Ir. C.L.R. 468.....	306
Brady v. Giles.....	1 Moo. & Rob. 494.....	61
Bradley v. Elliott.....	11 O.L.R. 398.....	305
Bray v. Ford.....	[1896] A.C. 44.....	433
Breeze v. Midland R.W. Co.....	26 Gr. 225.....	176
Brennan v. Emery-Bird-Thayer Dry Goods Co.....	99 Fed. R. 971.....	146
Breuner v. Liverpool, London and Globe Ins. Co.....	51 Cal. 101, 21 Am. Rep. 703.....	545
Bricks Estate.....	15 Abbott's Prac. 12.....	89

NAME OF CASE.	WHERE REPORTED.	PAGE
Bright v. River Plate Construction Co..	[1900] 2 Ch. 835.....	610, 611, 614
Bright v. Walker.....	1 C.M. & R. 211.....	495
Britain v. Rossiter.....	11 Q.B.D. 123.....	208
British South Africa Company, The, v. The Companhia De Mocambique..	[1893] A.C. 602.....	657
Broad v. Ham.....	5 Bing N.C. 722.....	332
Broadnax v. Baker.....	94 N.C. 675.....	244, 263
Bronson and City of Ottawa, Re.....	1 O.R. 414.....	536, 538
Brown v. Bushey.....	25 O.R. 612.....	10
Brown v. Byrne.....	3 E. & B. 702.....	359
Brown v. Carpenter.....	27 O.R. 412.....	92
Brown v. Hawkes.....	[1891] 2 Q.B. 718 (C.A.).....	333, 334
Brown v. London Street R.W. Co.....	2 O.L.R. 53.....	425
Brown v. Randall.....	36 Conn. 56.....	600, 602
Bruce Mines and Algoma R.W. Co.....	7 O.W.R. 157.....	172
Bullen v. Dunning.....	5 B. & C. 842.....	246
Bundy v. Johnson.....	6 C.P. 221.....	306
Bunnell v. Gordon.....	20 O.R. 281.....	539
Burdick v. Garrick.....	L.R. 5 Ch. 233.....	116
Burford, The Corporation of the Town- sh p of, v. Chambers.....	25 O.R. 663.....	611, 614
Burgoyne's Trade Mark.....	6 R.P.C. 227.....	145
Burke v. Blake.....	6 P.R. 260.....	354
Burley v. Bethune.....	5 Taunt 580.....	334
Burns v. Clark.....	37 C.L.J. 32.....	323
Burnside v. Marcus.....	17 C.P. 430.....	54
Burrell v. Burrell.....	1 Ambl. 660.....	5, 6
Buttemere v. Hayes.....	5 M. & W. 456.....	209
C.		
Cahuac v. Durie.....	9 Gr. 485.....	134, 137, 140
Caldwell v. McLaren.....	9 App. Cas. 392.....	255
Caledonian R.W. Co. v. Muirhead's Trawlers, Limited.....	41 Sc. L.R. 418.....	217
Callender v. Carleton Iron Co., Ltd....	9 Times L.R. 646.....	369
Cameron v. Cameron.....	2 Ch. Ch. 375.....	130
Cameron v. Wolfe Island.....	6 P.R. 91.....	130, 134, 141
Campbell v. Dunn.....	22 O.R. 98.....	114
Campbell v. Maloney.....	28 S.C.R. 228.....	660
Canada Landed Credit Co. v. McAllister.	21 Gr. 593.....	133
Canada Southern R.W. Co. v. Jackson..	17 S.C.R. 316.....	172
Canadian Bank of Commerce v. Tinning.	15 P.R. 401.....	8
Canadian Pacific R.W. Co. v. Fleming..	22 S.C.R. 33.....	563
Canadian Pacific R.W. Co. v. Notre Dame de Bonsecours.....	[1899] A.C. 367.....	174
Canal Commissioners v. People.....	5 Wend. 424.....	256
Capitol Ins. Co. v. Bank of Pleasanton..	31 Pacific R. 1069.....	544
Cardinal v. Smith.....	109 Mass. 158.....	600
Carpenter v. Wood.....	10 Gr. 354.....	524
Carrington v. Roots.....	2 M. & W. 248.....	209
Carter v. Stone.....	20 O.R. 340.....	129, 133, 138
Cartwright v. Municipal Corporation of the Town of Napanee.....	11 O.L.R. 69.....	81
Case v. Hotchkiss.....	1 Abb. App. Dec. (N.Y.) 324.....	200
Caster v. Township of Uxbridge.....	39 U.C.R. 113.....	394
Castrique v. Behrens.....	3 El. & El. 709.....	600, 601
Catton v. Bennett.....	26 Ch.D. 161.....	39
Cave v. Mills.....	7 H. & N. 913.....	101
Celluloid Manufacturing Co. v. Cellonite Manufacturing Co.....	32 Fed. R. 94.....	145



NAME OF CASE.	WHERE REPORTED.	PAGE
Certificate of the Judges, The, respecting		
a Courtmartial.....	2 Eden. 371 App.....	509
Chalie v. Duke of York.....	6 Esp. 45.....	200
Chambers v. Goldwin.....	9 Ves. 254, 7 R.R. 181.....	528
Champaigne v. The Grand Trunk R.W.		
Co.....	9 O.L.R. 589.....	635
Chatterton v. Watney.....	16 Ch.D. 378.....	597
Cherry v. Thompson.....	L.R. 7 Q.B. 573.....	207
Chick v. Toronto Electric Light Co.....	12 P.R. 58.....	108, 364, 368
Chinnoek v. Hartley Wintney Rural		
District Council.....	63 J.P. 327.....	339, 340, 344
Choate v. Ontario Rolling Mill Co.....	27 A.R. 155.....	553
Christie and Town of Toronto Junction,		
Re.....	24 O.R. 443.....	611, 614
Christopher v. Croil.....	16 Q.B.D. 66.....	652
Christopher v. Noxon.....	4 O.R. 672.....	105
Churchward v. The Queen.....	14 L.T.N.S. 57.....	622
Churton v. Frewen.....	15 W.R. 559.....	14
Cincinnati, Sandusky and Cleveland		
R.W. Co. v. Village of Belle River		
Centre.....	48 Ohio St. R. 273.....	538
Citizens Life Ass. Co., Ltd., v. Brown.....	[1904] A.C. 423.....	600
City Bank v. McConkey.....	3 U.C.L.J.N.S. 125.....	129, 133
City of Halifax v. Jones.....	28 N.S.L.R. 452.....	648
City of Halifax v. Western AssuranceCo.....	18 N.S.L.R. 387.....	648
City of Toronto v. Toronto Electric Co.....	11 O.L.R. 310.....	591
Civil v. Rich.....	1 Ch. Cas. 309.....	5, 6, 7
Civil Service Co-operative Society v.		
General Steam Navigation Co.....	[1903] 2 K.B. 756.....	146
Clarkson v. Dwan.....	17 P.R. 92.....	195
Clarkson v. Dwan.....	17 P.R. 264.....	201
Clarkson v. Severs.....	17 O.R. 592.....	129, 133
Clarkson v. Sterling.....	15 A.R. 234.....	232
Clayton v. Gregson.....	4 N. & M. 602.....	357
Clemens v. Town of Berlin.....	7 O.L.R. 33.....	166
Clergue v. McKay.....	6 O.L.R. 51.....	306
Clergue v. Preston.....	8 O.L.R. 84.....	306
Clout and Metropolitan and District		
R.W. Co., Re.....	46 L.T. 141.....	611
Cobban v. Canadian Pacific R.W. Co.....	23 A.R. 115.....	564
Cohen v. Mitchell.....	25 Q.B.D. 262.....	659
Coleman v. Brown.....	16 R.P.C. 619.....	146
College of Physicians v. Rose.....	6 Mod. 44, 3 Salk. 17.....	502
Collins v. Denison.....	2 Ch. Ch. 465.....	129
Colonial Bank v. Whinney.....	30 Ch.D. 261.....	658
Comisky v. Bowring-Hanburg.....	[1905] A.C. 84.....	2
Commarford v. Empire Limestone Co.....	11 O.L.R. 119.....	552
Conmee v. The Canadian Pacific R.W. Co.....	16 O.R. 639.....	611, 612, 613
Conrad v. Trustees of Village of Ithaca.....	16 N.Y. 159.....	167
Cooke v. Cooke.....	L.R. 4 Eq. 77.....	96
Cooke v. Lamotte.....	15 Beav. 234.....	183
Corporation of the City of Toronto v.		
The Great Western R.W. Co.....	25 U.C.R. 570.....	408
Corporation of Whitby v. Liscombe.....	23 Gr. 1.....	258, 259
Corsellis, Re.....	48 L.T.N.S. 425.....	422
Countess Dowager of Roscommon v.		
Fowke.....	6 Br. P.C. 158.....	4
Cox v. Adams.....	35 S.C.R. 393.....	179
Cox v. The Great Western R.W. Co.....	L.R. 9 Q.B.D. 106.....	636
Craig v. Gunn.....	94 Am. St. Rep. 77.....	603
Crockett v. Crockett.....	2 Ph. 553.....	7
Croft and Town of Peterborough, In re.....	17 A.R. 21.....	455

NAME OF CASE.	WHERE REPORTED.	PAGE
Cruikshank v. Corby, In re.....	30 C.P. 466.....	614
Cullimore v. Savage South Africa Co. ....	[1903] 2 Ir. R. 589.....	599
Cumming v. Landed Banking and Loan Co.....	20 O.R. 384, 22 S.C.R. 246.....	528
Cunnington v. Cunningham.....	2 O.L.R. 511.....	83, 87, 88
Curtis v. Mundy.....	[1892] 2 Q.B. 178.....	421
Cutten v. Mitchell.....	10 O.L.R. 734.....	186, 187

## D.

Daldry v. Toronto R.W. Co.....	6 O.W.R. 62.....	370
Dale v. Weston Lodge.....	24 A.R. 351.....	157
Dalton v. Angus.....	7 App. Cas. 740.....	497
Danger v. London Street R.W. Co.....	30 O.R. 493.....	369
Davey v. Cory.....	[1901] A.C. 477.....	35, 39
Davidson v. Douglas.....	15 Gr. 347.....	232
Davidson v. Fraser.....	23 A.R. 439.....	233, 236
Davidson v. Hill.....	[1901] 2 K.B. 606.....	383
Davies v. Mann.....	10 M. & W. 546.....	433, 435, 445
Davis v. Hardy.....	6 B. & C. 225.....	323
Davis's Case.....	Knapp & Ombler 160.....	19
Dawson v. Dawson.....	12 Gr. 278.....	179
Dawson v. Great Northern and City R.W. Co.....	[1904] 1 K.B. 277.....	658, 659
Dean v. Branthwaite.....	5 Esp. 35.....	75
Derochie v. Town of Cornwall.....	23 O.R. 355, 21 A.R. 279.....	424
Dickinson v. Dodds.....	2 Ch.D. 463.....	415
Dickson v. Kinneway.....	[1900] 1 Ch. 833.....	98
Diggles, In re, Gregory v. Edmondson.....	29 Ch.D. 253.....	2
Dillon and Village of Cardinal, Re.....	10 O.L.R. 371.....	81
Dixson v. Snetsinger.....	23 C.P. 235.....	250, 253, 257, 259
Dobson v. Groves.....	6 Q.B. 637.....	612
Doe, Anderson v. Todd.....	2 U.C.R. 82.....	259
Doe, d. Leeming v. Skirrow.....	2 N. & P. 123.....	163
Dominion Iron and Steel Co., The v. Day.....	34 S.C.R. 387.....	120
Dominion Iron and Steel Co., The v. Oliver.....	35 S.C.R. 517.....	369
Dominion Savings and Investment Society of London v. Kittridge.....	23 Gr. 631.....	142
Donaldson v. Wherry.....	29 O.R. 552.....	92
Donnelly v. Bawden.....	40 U.C.R. 611.....	323
Doolittle v. Electrical Maintenance and Construction Co., Re.....	3 O.L.R. 460.....	206, 207, 208, 210
Dover v. Denne.....	3 O.L.R. 664.....	528
Doyle v. Diamond Flint Glass Co.....	8 O.L.R. 499.....	119, 122
Drew v. Power.....	1 Sch. & L. 182.....	528
Dublin, Wicklow and Wexford R.W. Co., Directors, etc., of the, v. Slattery.....	3 App. Cas. 1135.....	372
Duckworth v. Lancashire and Yorkshire R.W. Co.....	84 L.T.N.S. 774.....	217
Duke of Beaufort v. Lord Ashburnham.....	13 C.B.N.S. 598.....	14
Duke of Sutherland v. Heathcote.....	[1892] 1 Ch. 475.....	57
Dundas v. Waddell.....	5 App. Cas. 249.....	527
Dunlop v. Dunlop.....	10 A.R. 670.....	179
Dunlop v. Township of York.....	16 Gr. 216.....	335, 340
Dunsmuir v. Lowenberg.....	34 S.C.R. 228.....	424
Dyke v. Stephens.....	30 Ch.D. 189.....	422

## E.

NAME OF CASE.	WHERE REPORTED.	PAGE
Earl de la Warr v. Miles.....	17 Ch.D. 535.....	496, 499
Earls v. MacAlpine.....	6 A.R. 145.....	401
Eastman Photographic Materials Co. v. Comptroller-General of Patents.....	[1898] A.C. 571.....	146
East Tennessee, etc., R. Co. v. Winters.....	85 Tenn. 240.....	566
East Texas Fire Ins. Co. v. Kempner.....	34 S.W.R. 393.....	543
Eastwood v. Kenyon.....	11 A. & E. 438.....	209
Eckersley et al. v. Mersey Docks and Harbour Board.....	[1894] 2 Q.B. 667.....	610, 611
Eclipse Oil Co. v. South Penn. Oil Co.....	34 S.E.R. 923.....	55
Eddy v. Booth.....	7 O.W.R. 75.....	240
Edinburgh Life Assurance Co. v. Allen.....	23 Gr. 230.....	524, 526, 528
Egerton v. Earl Brownlow.....	4 H.L.C. 1.....	614
Ellen v. Great Northern R.W. Co.....	17 Times L.R. 453.....	119
Elliott v. Thomas.....	3 M. & W. 170.....	209
Ellis v. The Great Western R.W. Co.....	L.R. 9 C.P. 551.....	369
Ellis v. The Sheffield Gas Consumers Co.....	2 El. & B. 767.....	229
Emery v. Ginnan.....	24 Ill. App. Ct. 65.....	599, 602
Empire Oil Co. v. Vallerand.....	17 P.R. 27.....	206, 207
English and Foreign Credit Co. v. Arduin.....	L.R. 5 H.L. 64.....	357
Essery v. Court Pride of the Dominion.....	2 O.R. 596.....	157
Esson v. McMaster.....	1 Kerr N.B. 501.....	242
Evans v. Hoare.....	[1892] 1 Q.B. 593.....	306

## F.

Farina, In re.....	27 W.R. 456.....	145
Farrell v. Grand Trunk R.W. Co.....	2 Can. Ry. Cas. 249.....	635, 640
Farwell v. Boston and Worcester R.W. Co.....	4 Metc. 49.....	552
Federal Oil Co. v. Western Oil Co.....	112 Fed. 373.....	55
Fee v. Hawkins.....	8 Taunt. 92.....	105
Fenton v. McWain.....	41 U.C.R. 239.....	319
Filby v. Hounsell.....	[1896] 2 Ch. 737.....	306
Finch, In re, Finch v. Finch.....	23 Ch.D. 267.....	486
Fitchett v. Mellow.....	18 P.R. 161.....	229
Fisher v. Bristow.....	1 Doug. 216.....	600
Fisher v. The Apollinaris Co.....	44 L.J.N.S. 500.....	599
Fitzgerald v. Grand Trunk R.W. Co.....	4 A.R. 601, 5 S.C.R. 204.....	218
Flett v. Coulter.....	4 O.L.R. 714.....	421
Fliteroft's Case.....	21 Ch.D. 520.....	35
Follett v. Toronto Street R.W. Co.....	15 A.R. 346.....	369
Ford v. Lacey.....	7 H. & N. 151.....	424
Formularo v. Forest City Laundry Co..	(p. 82, Boyd, C's, note book of 1906; at London).....	187
Foster v. Elk Fork Oil and Gas Co.....	90 Fed. 178.....	55
Foster v. Fraser.....	[1893] 3 Ch. 158.....	408
Foster v. Wright.....	4 C.P.D. 438.....	391, 392
Fowler v. Lock.....	L.R. 7 C.P. 272.....	63, 64
Fox v. Glynn.....	S.C. Mass., April 3, 1906, not reported.....	145
Fraser v. London Street R.W. Co.....	18 P.R. 370.....	404
Fricker v. Tomlinson.....	1 M. & Gr. 772.....	209
Fromont v. Coupland.....	2 Bing. 170.....	77
Funk v. Haldeman.....	53 Penn. 229.....	57

## G.

Gage v. Bates.....	7 C.P. 116.....	250, 253, 259
Gallagher v. Taylor.....	5 S.C.R. 368.....	67



NAME OF CASE.	WHERE REPORTED.	PAGE
Gallagher v. Stoddart.....	54 N.Y. 101 (47 Hun.).....	599, 603
Gallinger v. The Toronto R.W. Co.....	8 O.L.R. 698.....	378, 379
Gann v. Free Fishers of Whitstable.....	11 H.L. 192.....	261
Gardner v. Grace.....	1 F. & F. 359.....	642
Genesee Chief, The, v. Fitzhugh.....	12 Howard 443.....	256
Gibson v. Gardner.....	7 O.W.R. 474.....	84, 90
Gilbert, In re.....	28 Ch.D. 549.....	146
Gilchrist v. Gardner.....	12 N.S. Wales L.R. 184.....	600
Gilchrist v. Township of Carden.....	26 C.P. 1.....	166, 167
Gillett v. Lumsden.....	8 O.L.R. 168.....	149
Gillett v. Thornton.....	L.R. 19 Eq. 599.....	96
Gill v. Pearson.....	6 East. 173.....	402
Gilmour v. Cameron.....	6 Gr. 290.....	134
Girdlestone v. Lavender.....	9 Hare, Appendix LIII.....	129
Glen Cove Manufacturing Co. v. Ludeling.....	22 Fed. R. 823.....	145
Glenwood Lumber Co., Ltd., v. Phillips.....	[1904] A.C. 405.....	54
Glover v. Southern Loan and Savings Co.....	1 O.L.R. 59.....	133
Goddard v. Smith.....	6 Mod. 262.....	601
Goldman v. Mason.....	2 N.Y. Supp. 337.....	66
Gold Ores Reduction Co., Ltd., v. Parr.....	[1892] 2 Q.B. 14.....	194
Gooderham v. City of Toronto.....	19 A.R. 641, 25 S.C.R. 246.....	10, 11
Gooderham v. Corporation of the City of Toronto.....	25 S.C.R. 246.....	11
Goodwin v. Williams.....	5 Gr. 178.....	134, 140
Gordon Mackay & Co. v. Union Bank of Canada.....	26 A.R. 155.....	233, 235
Gorris v. Scott.....	L.R. 9 Ex. 125.....	635, 641
Goslin v. Wilcock.....	2 Wilson 302.....	603
Gowan v. Christie.....	L.R. 2 Sc. App. 273.....	57
Graham v. Myers.....	67 Mich. 277.....	198
Grandin v. New Ontario S.S. Co.....	6 O.W.R. 553.....	48, 49
Grand Rapids and Indiana R.W. Co. v. Butler.....	159 U.S.R. 87.....	256
Grand Trunk R.W. Co. v. Hainer.....	36 S.C.R. 180.....	563, 635
Grand Trunk R.W. Co., The v. McKay.....	3 Can. Ry. Cas. 52.....	635
Grand Trunk R.W. Co. of Canada v. McKay.....	34 S.C.R. 81.....	635
Granger v. Gough.....	[1896] A.C. 325.....	649
Grant v. Great Western R.W. Co.....	7 C.P. 438.....	83, 88
Grant v. Howard Ins. Co. of New York.....	5 Hill N.Y. 10.....	544, 545
Greathead v. Bromley.....	7 T.R. 456.....	526
Great North-Western Central R.W. Co. v. Charlebois.....	[1899] A.C. 114.....	528
Great Western R.W. Co. of Canada v. Braid.....	1 Moo. P.C.N.S. 101.....	424
Grieve v. Molsons Bank.....	8 O.R. 162.....	424
Grimes v. City of Toronto.....	Not reported.....	167
Guerin v. Manchester Fire Assurance Co.....	29 S.C.R. 139.....	543
Gunn v. Doble.....	15 Gr. 655.....	129

## H.

Hackney Case, The.....	2 O'M. & H. 77.....	81
Hagel v. Dalrymple, In re.....	8 P.R. 183.....	207
Haight v. McVeagh.....	69 Ill. 624.....	198
Halifax, City of, v. Jones.....	28 N.S.L.R. 452.....	648
Hall v. Pritchett.....	3 Q.B.D. 215.....	596
Haigh and London and North-Western R.W. Co., Re.....	[1896] 1 Q.B. 649.....	610
Haist v. Grand Trunk Railway Co.....	26 O.R. 19, 22 A.R. 504.....	120
Hamelin v. Bannerman.....	[1895] A.C. 237.....	267

NAME OF CASE.	WHERE REPORTED.	PAGE
Hamier v. Sharp.....	L.R. 19 Eq. 108.....	305
Hamilton Case.....	1 Ont. Elec. Cas. 499.....	19
Hamilton v. Cousineau.....	19 A.R. 203.....	323, 326, 333
Hammerton v. Honey.....	24 W.R. 603.....	499
Hanson v. Waller.....	[1901] 1 K.B. 390.....	599
Hardin v. Jordan.....	140 U.S.R. 371.....	256
Hare v. Horton.....	5 B. & Ad. 715.....	266
Harrison, Re.....	18 P.R. 303.....	114
Harrison v. Mitchell.....	Fitzgibbons 303.....	89
Harty v. Gooderham.....	31 U.C.R. 18.....	306
Harvey v. Anning.....	67 J.P. 73.....	486
Harvey v. Facey.....	[1893] A.C. 552.....	303, 305, 308
Harvey v. McNeil.....	12 P.R. 362.....	129
Harvey v. Shelton.....	7 Beav. 455.....	612
Hawkins v. Mahaffey.....	29 Gr. 326.....	264
Hay v. Johnston.....	12 P.R. 596.....	194
Heath v. Heath.....	26 L.J.M.C. 49.....	334
Heddlestone v. Heddlestone.....	15 O.R. 280.....	399, 400
Hedley's Trade Marks, Re.....	17 R.P.C. 719.....	146
Heneker v. British America Assurance Co.....	14 C.P. 57.....	543, 545, 546
Hennessy v. Wright (No. 2).....	24 Q.B.D. 445.....	470
Hexamer v. Webb.....	101 N.Y. 377.....	66
Hick, In the Matter of.....	8 Taunt. 694.....	614
Hicks v. Faulkner.....	8 Q.B.D. 167.....	323, 325
Hiddle v. National Fire and Marine Ins. Co. of New Zealand.....	[1896] A.C. 375.....	369
Hiles v. Corporation of the Township of Ellice.....	1 Clarke and Scully's Drainage Cases 89.....	229
Hinds v. The Corporation of the Town of Barrie.....	6 O.L.R. 656.....	48, 49, 50
Hindson v. Ashby.....	[1896] 2 Ch. 1.....	265
Hoare v. Graham.....	3 Camp. 518.....	104
Hobin v. City of Ottawa.....	8 O.W.R. 589.....	109
Hoffman v. Crerar.....	18 P.R. 473.....	198, 202
Hogaboom v. The Receiver-General of Canada, Central Bank of Canada, In re.....	28 S.C.R. 192.....	83
Holford v. Bailey.....	8 Q.B. 1000, 13 Q.B. 426.....	265
Holgate v. Shutt.....	27 Ch.D. 111, 28 Ch.D. 111.....	526, 528
Hollender v. Ffoulkes.....	16 P.R. 175.....	194, 195, 200, 203
Hollinger v. Canadian Pacific R.W. Co.....	21 O.R. 705.....	562
Hollinger v. Canadian Pacific R.W. Co.....	20 A.R. 244.....	636
Hollins v. Verney.....	13 Q.B.D. 304.....	496
Homer v. Ashford.....	3 Bing. 322.....	54
Honour v. Equitable Life Ins. Society of the United States.....	[1900] 1 Ch. 852.....	537
Hopper, In re.....	L.R. 2 Q.B. 367.....	610, 611, 612, 614, 617
Horsburgh & Co.'s Application, In re.....	53 L.J.N.S. Ch. 237.....	146
Howell's Executors v. Baltimore Equit- able Society.....	16 Md. 377.....	544
Howells v. Landore-Siemens Steel Co.....	L.R. 10 Q.B. 62.....	552
Hoxsie v. Providence Mutual Fire Ins. Co.....	6 Rd. Id. 517.....	544
Hubbock v. Brown.....	17 R.P.C. 148.....	146
Hubert v. Township of Yarmouth.....	18 O.R. 458.....	396
Huffman v. Doner.....	12 P.R. 492.....	194, 203
Huggins v. Daley.....	99 Fed. 606.....	55
Huggins v. Law.....	14 A.R. 383.....	113

NAME OF CASE.	WHERE REPORTED.	PAGE
Hughes v. Justin.....	[1894] 1 Q.B. 667.....	198
Hull v. Alway.....	4 O.S. 375.....	95
Hull and Selby R.W. Co., In re.....	5 M. & W. 327.....	391
Humfrey v. Dale.....	7 E. & B. 266, E.B. & E. 1004...	359
Humphrey v. Dale.....	26 L.J.Q.B. 137.....	357
Humphries, Re.....	18 P.R. 289.....	112, 114
Hunter v. Grand Trunk R.W. Co.....	16 P.R. 385.....	424
Hunter v. Stewart.....	31 L.J.N.S. Ch. 346.....	527
Hunt, qui tam, v. Shaver.....	22 A.R. 202.....	44, 45, 46
Hurdman v. Thompson.....	4 Que. R. (Q.B.) 409.....	263
Hussey v. Horne-Payne.....	4 App. Cas. 311.....	305
Hutchinson and Tenant, In re.....	8 Ch.D. 540.....	2
Huxley v. West London Extension R.W. Co.....	17 Q.B.D. 373.....	397
Hyslop v. Township of McGillivray.....	12 O.R. 749, 15 A.R. 687.....	395

## I.

Ibo Syndicate, Ltd., v. Wyler.....	87 L.T.N.S. 83.....	369
Illinois Central R.W. Co. v. State of Illinois.....	146 U.S.R. 387.....	261
Imperial Paper Mills of Canada v. McDonald.....	7 O.W.R. 472.....	52
International Wrecking Co. v. Lobb.....	12 P.R. 207.....	132
Ireland v. Pitcher.....	11 P.R. 403.....	364
Irvine v. Sparks.....	31 O.R. 603.....	91, 93

## J.

Jackson v. Barry R.W. Co.....	[1893] 1 Ch. 238.....	610
Jamieson v. Harris.....	35 S.C.R. 625.....	554
Jamieson v. Jamieson.....	15 R.P.C. 169.....	145
Jennings v. Grand Trunk R.W. Co.....	13 App. Cas. 800.....	562
Jervis v. Berridge.....	L.R. 8 Ch. 351.....	307
Jex v. McKinney.....	14 App. Cas. 77.....	258
Johnson, In re.....	20 Ch.D. 389.....	179
Johnson v. Dominion Express Co.....	28 O.R. 203.....	217
Johnston v. Dodson.....	2 M. & W. 653.....	209
Johnson v. Grand Trunk R.W. Co.....	21 A.R. 408.....	562
Johnston v. Orr-Ewing.....	7 App. Cas. 219.....	145, 152, 153
Johnston v. Rogers.....	30 O.R. 150.....	303, 304, 305, 308
Jones v. Corporation of Liverpool.....	14 Q.B.D. 890.....	63
Jones v. Curling.....	13 Q.B.D. 262.....	397
Jones v. Daniel.....	[1894] 2 Ch. 332.....	305
Jones v. Scullard.....	[1898] 2 Q.B. 565.....	61, 63, 64
Juggornohun Ghose v. Manickehund.....	7 Moo. Ind. App. 263.....	357

## K.

Kains v. Turville.....	32 U.C.R. 17.....	255
Keen v. Henry.....	[1894] 1 Q.B. 292.....	63, 64, 69
Keller v. City of Corpus Christi.....	50 Texas 614.....	537
Kelly v. Barton.....	26 O.R. 603.....	596
Kelly v. Kelly.....	L.R. 2 P. & M. 31.....	576, 580
Kemp v. Kemp.....	5 Ves. 849.....	5, 6
Kemp v. Rose.....	1 Giff 258.....	612
Kennedy v. American Express Co.....	22 A.R. 278.....	217
Kerr v. Styles.....	26 Gr. 309.....	133
Kibble v. Gough.....	38 L.T. 204.....	207
King v. Alford.....	9 O.R. 643.....	173, 174, 176, 177



NAME OF CASE.	WHERE REPORTED.	PAGE
King v. Gillard.....	[1905] 2 Ch. 7.....	146
King v. London Improved Cab Co.....	23 Q.B.D. 281.....	63, 64, 69
King v. Spurr.....	8 Q.B.D. 104.....	64, 69
King, The v. Victoria Fire Insurance Co.....	[1853] A.C. 250.....	660, 657
King, The v. Hanson.....	4 B. & Ald. 519.....	22
King, The v. Inhabitants of Parish of St. Benedict.....	4 B. & Ald. 447.....	340
Kingman v. Sparrow.....	12 Barb. 201.....	256
Kirchoffer v. Stanberry.....	25 Gr. 413.....	248, 268
Kirchner v. Venus.....	12 Moo. P.C. 361.....	354
Knights v. Wiffen.....	L.R. 5 Q.B. 660.....	98
Knott Ex. p.....	11 Ves. 609.....	137, 142
Kuntz v. Niagara District Fire Ins. Co.....	16 C.P. 573.....	542
L.		
Laidlaw v. O'Connor.....	23 O.R. 696.....	658, 659, 660
Lake Erie and Detroit River R.W. Co., The v. Barclay.....	30 S.C.R. 360. 563, 633, 636, 637, 638 L.R. 10 Eq. 267, 6 Ch. 597.....	2
Landrigan v. The Brooklyn Heights Railroad Co.....	23 App.Div.Sup.Ct.N.Y.(Hun.)43	369
Langford v. Boston and Albany R.R.Co.....	144 Mass. 431.....	602
Langmeade v. Maple.....	18 C.B.N.S. 255.....	527
Laplante and Corporation of Peter- borough, Re.....	5 O.R. 634.....	10
Lapointe v. Montreal Police Benevolent and Pension Society.....	35 S.C.R. 5.....	588
Larkin v. Gardiner.....	27 O.R. 125.....	415
Larsen v. Nelson and Fort Sheppard R.W. Co.....	4 B.C.R. 151.....	176
Laslett v. Cliffe.....	2 Sm. & G. 278.....	129
Laugher v. Pointer.....	5 B. & C. 547.....	74
Lavin v. Lavin.....	7 A.R. 197.....	179
Laycock v. Pickles.....	4 B. & S. 497.....	528
Leaf v. Tuton.....	10 M. & W. 393.....	208
Leather Cloth Co. v. American Leather Cloth Co.....	11 Jur. N.S. 513, 35 L.J.N.S. Ch. 53, 11 H.L.C. 523.....	145
Lee v. Sankey.....	L.R. 15 Eq. 204.....	115
Lee v. Smith.....	42 Oh. 458.....	483
Leeming, Doe d., v. Skirrow.....	2 N. & P. 123.....	163
Lefebvre v. The Queen.....	1 Ex. C.R. 121.....	268
Leeson v. General Council of Medical Education and Registration.....	43 Ch.D. 366.....	283, 614, 616
Leishman v. Garland.....	3 O.L.R. 241.....	91, 93
Leitch v. Abbott.....	31 Ch.D. 374.....	187
Le Marchant v. Le Marchant.....	L.R. 14 Eq. 414.....	2
Lennox Provincial Election Case.....	1 Ont. Elec. Cas. 422.....	22
Leonard and Ellis's Trade Mark, In re.....	26 Ch.D. 288.....	146
Leroux v. Brown.....	12 C.B. 801.....	209
Lever v. Beddingfield.....	16 R.P.C. 3.....	146
Lewis v. Marshall.....	7 M. & G. 729.....	357
Loftus v. Meyer.....	84 N.Y. Supp. 861 (118 N.Y. St. Rep.).....	603
Logan v. London Street R.W. Co.....	Not reported.....	378
London, The Corporation of the City of, v. Watt.....	22 S.C.R. 300.....	408
London Chartered Bank v. McMillan.....	[1892] A.C. 292.....	101
London Mutual Ins. Co. v. City of London.....	15 A.R. 629.....	408

NAME OF CASE.	WHERE REPORTED.	PAGE
London Street R.W. Co. v. Brown.....	31 S.C.R. 642.....	425
London and County Banking Co. v. Dover.....	11 Ch.D. 204.....	129
London and Globe Finance Corporation (Ltd.), Re.....	10 Mans. B.C. 198.....	283
London and South-Western R.W. Co. v. Blackmore.....	L.R. 4 H.L. 610.....	119
Longmore v. Broom.....	7 Ves. 124.....	2
Long Point Co. v. Anderson, In re.....	18 A.R. 401.....	418, 419, 420
Lord v. Commissioners of Sydney.....	12 Moo. P.C. 473.....	247, 255, 266
Lord's Day Act of Ontario, Re.....	1 O.W.R. 312.....	509
Luetgert v. Volker.....	153 Ill. 385.....	198
Lynch v. Nurdin.....	1 Q.B. 29.....	636
Lynch v. Seymour.....	15 S.C.R. 341.....	54
Lynch v. Versailles Fuel Gas Co.....	165 Penn. 518.....	57
Lyon v. Fishmongers' Co.....	1 App. Cas. 662.....	267

## MAC.

Macdonald v. City of Toronto.....	18 P.R. 17.....	8
Macdonnell v. Purcell.....	23 S.C.R. 101.....	258
Macfie v. Hutchinson, Re.....	12 P.R. 167.....	418
Mackay v. President, etc., of the Com- mercial Bank of New Brunswick.....	5 P.C. 394.....	600
Mackenzie v. Mackenzie.....	[1895] A.C. 384, 574, 576, 580, 582, 592	
MacKenzie v. Ross.....	14 P.R. 299.....	194
Macleay, In re.....	L.R. 20 Eq. 186.....	400, 401, 402
Maclellan v. Hooey.....	1 O.W.R. 707.....	321

## MC.

McCartee and Corporation of the Town- ship of Mulmur, Re.....	32 O.R. 69.....	81
McClelland's Executor v. West.....	70 Penn. 183.....	200
McConnachie v. Great North of Scotland R.W. Co.....	3 Rett. 79.....	218
McCormick v. Sisson.....	7 Cowen (N.Y.S.C.) 715.....	599, 603
McCormick v. Township of Pelee.....	20 O.R. 288.....	388
McCulloch v. Township of Caledonia.....	2 Clarke and Scully's Drainage Cases, 1.....	229
McDonald v. Dickenson.....	24 A.R. 31.....	166
McDougall, Re.....	8 O.L.R. 640.....	2
McDonough, Re.....	30 U.C.R. 288.....	256
McGannon v. Clarke.....	9 P.R. 555.....	14
McGarry v. Loomis.....	63 N.Y. Rep. 108.....	640
McGibbon v. Abbott.....	10 App. Cas. 653.....	6
McInnes v. McGaw, Re.....	30 O.R. 38.....	418
McIntyre, In re.....	11 O.L.R. 136.....	83
McKelvey v. Chilman.....	5 O.L.R. 263.....	364
McKinnon v. Penson.....	8 Ex. 319.....	166
McKinnon v. Roche.....	18 A.R. 646.....	233
McLaren v. Caldwell.....	6 A.R. 456.....	243
McLaren v. Caldwell.....	8 S.C.R. 435.....	263, 264
McLean v. Cross.....	3 Ch. Ch. 432.....	614, 617
McNair v. Boyd.....	14 P.R. 132.....	229
McNaughton v. Caledonian R.W. Co.....	28 L.T.N.S. 376.....	553
McNeeley v. McWilliams.....	13 A.R. 324.....	105
M'Pherson v. Gedge.....	4 O.R. 246.....	9
McShane v. The Toronto, Hamilton and Bruce R.W. Co.....	31 O.R. 185.....	636, 642
McSheffrey v. Lanagan.....	20 L.R. Ir. 528.....	364, 365, 368
McVicar v. McLaughlin.....	16 P.R. 450.....	195, 201

## M.

NAME OF CASE	WHERE REPORTED.	PAGE
Machu, Re.....	21 Ch.D. 838.....	401
Machu v. London v. South Western R.W. Co.....	2 Ex. 415.....	218
Mackett v. Mackett.....	L.R. 14 Eq. 49.....	2
Maddison v. Alderson.....	8 App. Cas. 467.....	208
Makins v. Piggott.....	29 S.C.R. 188.....	636, 642, 643
Malcolm v. Perth Mutual Fire Ins. Co.....	29 O.R. 406.....	326
Mann v. Brodie.....	10 App. Cas. 378.....	335
Markle v. Donaldson.....	7 O.L.R. 376, 8 O.L.R. 682.....	552
Matthew v. Northern Assurance Co.....	9 Ch.D. 80.....	111
Marshall v. Jamieson.....	42 U.C.R. 115.....	355
Marshall v. Lynn.....	6 M. & W. 109.....	358
Martin and Dagneau, Re.....	11 O.L.R. 349.....	400, 401
Martin v. Great Indian Peninsular R.W. Co.....	L.R. 3 Ex. 9.....	218
Mason v. Seney.....	11 Gr. 447.....	179
Massawippi Valley R.W. Co. v. Reed.....	33 S.C.R. 457.....	255
May v. Lane.....	71 L.T. 869.....	658, 659, 660
Mayor v. Collins.....	24 Q.B.D. 361.....	421
Mayor of Lynn v. Turner.....	Cowp. 86.....	260
Mayor of Lyons v. East India Co.....	1 Moo. P.C. 175.....	258
Meaby & Co. v. Triticine Ltd.....	15 R.P.C. 1.....	146
Merrill v. Insurance Company of North America.....	23 Fed. R. 245.....	543
Merritt v. Stephenson.....	7 Gr. 22.....	129
Metcalf v. St. Paul City Ry. Co.....	84 N.W.R. 633.....	369
Michell v. Williams.....	11 M. & W. 205.....	332
Micklethwait v. Newlay Bridge Co.....	33 Ch.D. 133.....	247
Milbank v. Milbank.....	[1901] 1 Ch. 376.....	49
Miles v. Cameron.....	9 P.R. 502.....	130
Miles v. Haslehurst.....	23 Times L.R. 142.....	219
Miles v. Rose.....	5 Taunt. 705.....	260
Miller v. Manitoba Lumber and Fuel Co.....	10 C.L.T. Occ. N. 230.....	599
Miller v. Robertson.....	35 S.C.R. 80.....	537
Miller v. Sarnia Gas and Electric Co.....	2 O.L.R. 546.....	39
Miller and Great Western R.W. Co., Re.....	13 U.C.R. 582.....	255
Milligan v. Wedge.....	12 A. & E. 737.....	63
Miner v. Gilmour.....	12 Moo. P.C. 131.....	267
Misa v. Currie.....	1 App. Cas. 554.....	233
Misener v. Wabash R.W. Co.....	12 O.L.R. 71.....	562
Mitchell v. Henry.....	15 Ch.D. 181.....	146
Mitchell v. Jenkins.....	5 B. & Ad. 588.....	334
Mitchell v. Reynolds.....	1 P. Wms. 181.....	54
Mitchell v. Smale.....	140 U.S.R. 406.....	256
Moffat v. Roddy.....	Michaelmas Term 2 Vict.....	253
Moir v. Williams.....	[1892] 1 Q.B. 264.....	408
Mollett v. Robinson.....	L.R. 5 C.P. 646.....	359
Monmouth Canal Co. v. Harford.....	1 C.M. & R. 614.....	495
Monmouth Case.....	Knapp and Ombler 409.....	19
Montello, The.....	20 Wallace 430.....	243
Montgomery v. Foy, Morgan & Co.....	[1895] 2 Q.B. 321.....	52
Moore v. Death.....	16 P.R. 296.....	39
Moore v. Grand Trunk R.W. Co.....	S.C.R., not reported.....	554
Moore v. Harris.....	1 App. Cas. 318.....	217
Moore v. Phoenix Ins. Co.....	64 N.H. 140.....	544
Moore v. Woodstock Woollen Mills Co.....	29 S.C.R. 627.....	337
Moreton v. Hardern.....	4 B. & C. 223.....	76
Morgan v. Hughes.....	2 T.R. 225.....	601
Morgan v. Vale of Neath R.W. Co.....	5 B. & S. 570.....	552
Morrow v. Lancashire Ins. Co.....	29 O.R. 377.....	543



NAME OF CASE.	WHERE REPORTED.	PAGE
Morton v. Grand Trunk R.W. Co.	8 O.L.R. 372	53
Morton and The Corporation of the City of St. Thomas, In re	6 A.R. 323	10
Moseley v. Simpson	L.R. 16 Eq. 226	610, 611, 612
Mountford v. Willis	2 B. & P. 337	200
Moxham v. Grant	[1900] 1 Q.B. 88	35, 39
Moyle v. Jenkins	8 Q.B.D. 116	119
Munro v. Pike	15 P.R. 164	195
Myers v. Saal	30 L.J.Q.B. 9	357
Mytton v. Duck	26 U.C.R. 61	335, 343
Mytton v. Mytton	11 P.D. 141	577

## N.

National Bank of Australasia v. Morris	[1892] A.C. 287	232
National Funds Assurance Co., In re	10 Ch.D. 118	232
Neale v. Molineux	2 C. & K. 672	655
Nebraska and Iowa Ins. Co. v. Christien- sen	45 N.W.R. 924, 26 Am. St. R. 407	543, 552
Nelles v. Elliot	25 Gr. 329	2
Nelson v. State Board of Health	108 Ky. 769	502
Nevill v. Township of Ross	22 C.P. 487	167
Newby v. Von Oppen et al.	L.R. 7 Q.B. 293	416
New Brunswick R.W. Co. v. Vanwart	17 S.C.R. 35	636
Newen v. Wetten	31 Beav. 315	526
New London Syndicate v. Neal	[1898] 2 Q.B. 487	104
Newton v. Lilly	42 C.L.J. 440	233
New Windsor Case	Knapp and Ombler 139	18
Niagara Falls and Whirlpool R.W. Co., Re	108 N.Y. 375	537
Nichol v. Thompson	1 Camp. 52 N.	200
Nolan v. Copeman	L.R. 8 Q.B. 85	15
North America Fire Ins. Co. v. Zaenger	63 Ill. 464	544
North British Railway Co. v. Wood	18 Ct. of Sess. Cas., 4th series (Rettie) 27	120, 125
North British and Mercantile Ins. Co. v. Steiger	124 Ill. 81	544
North British Mercantile Ins. Co. v. Union Stockyards Co.	87 S.W.R. 285	543, 546
N.E. Marine, etc., Co. v. Leeds Forge Co.	[1906] 1 Ch. 324	539
North Perth Election, The	20 S.C.R. 331	67
Northern Pacific Express Co. v. Martin	26 S.C.R. 135	217
Northern Pacific R.W. Co. v. Hambly	154 U.S.R. 349	553
Northern Transportation Co. v. McClary	66 Ill. 233	217
Northey Stone Co. v. Gidney	[1894] 1 Q.B. 99	206
North Shore R.W. Co. v. Pion	14 App. Cas. 612	267
Norris v. Beasley	2 C.P.D. 80	52
Nowery v. Connolly	29 U.C.R. 39	57

## O.

O'Connor v. City of Hamilton	10 O.L.R. 529	121
Offin v. Rochford Rural District Council	[1906] 1 Ch. 342	537, 539
Offord v. Bresse	16 P.R. 332	207
Ogle v. Earl Vane	L.R. 2 Q.B. 275, L.R. 3 Q.B. 272	358
O'Hearn v. Town of Port Arthur	4 O.L.R. 209	369
Oldfield, In re, Oldfield v. Oldfield	[1904] 1 Ch. 549	2
Orr Ewing v. Colquhoun	2 App. Cas. 839	268

## P.

NAME OF CASE.	WHERE REPORTED.	PAGE
Palmer v. Palmer.....	Holmsted and Langton, 3rd ed. 1368.....	41
Palmer's Application, In re.....	21 Ch.D. 47.....	146
Panton v. Williams.....	2 Q.B. 169.....	332
Parent v. Cook.....	2 O.L.R. 709, 3 O.L.R. 350.....	39
Parker v. Elliott.....	1 C.P. 470.....	250, 251
Parker v. Farley.....	10 Cush. 279.....	603
Parker v. Parker.....	32 C.P. 113.....	486
Parkinson v. Hanbury.....	L.R. 2 H.L. 1.....	528
Partridge, Ex. p.....	19 Q.B.D. 467.....	287
Partridge v. General Medical Council of Medical Education and Registration.....	25 Q.B.D. 95.....	287, 288
Patten v. Rea.....	2 C.B.N.S. 606.....	75
Patterson v. Choate.....	7 Wendell 441.....	200
Patterson v. Fanning.....	2 O.L.R. 462.....	635
Paxton v. Baird.....	[1893] 1 Q.B. 139.....	201
Peart v. Grand Trunk R.W. Co.....	10 O.L.R. 753.....	563
Pemberton v. Topham.....	1 Beav. 316.....	9
Penny v. Wimbledon Urban District Council.....	[1898] 2 Q.B. 212, [1899] 2 Q.B. 72.....	229
Perth, The North, Election.....	20 S.C.R. 331.....	67
Petrel, The.....	[1893] P. 320.....	552
Pew v. Hastings.....	1 Barb. 452.....	83
Pharmaceutical Society v. Armson.....	[1894] 2 Q.B. 720.....	286
Philadelphia, etc., R. Co. v. Spearen.....	47 Penn. St. 300.....	566
Phillipps v. Briard.....	1 H. & N. 21.....	359
Phillips v. City of Belleville.....	10 O.L.R. 178.....	132
Phillips v. The Grand Trunk Railway of Canada.....	1 O.L.R. 28.....	369, 378
Phillipson v. Kerry.....	32 Beav. 628.....	183
Pickard v. Smith.....	10 C.B.N.S. 470.....	227
Pickett and Township of Wainfleet, Re.....	28 O.R. 464.....	81
Pierce v. Street.....	3 B. & Ad. 397.....	600
Piggott v. His Majesty the King.....	10 Ex. C.R. 248.....	622
Pinhorn v. Tuckington.....	3 Camp. 468.....	200
Plant v. Township of Normanby.....	10 O.L.R. 16.....	394
Pollock v. German Fire Ins. Co. of Pitts- burg.....	86 N.W.R. 1017.....	544
Poole v. Huskinson.....	11 M. & W. 827, 63 R.R. 782.....	335, 342
Pooley v. Driver.....	5 Ch.D. 458.....	26
Porteous v. Muir.....	8 O.R. 127.....	105
Potter v. Potter.....	1 Rh. Id. 43.....	163
Potter Drug and Chemical Corporation v. Pasfield Soap Co.....	102 Fed. R. 490.....	146
Powles v. Hider.....	6 E. & B. 207.....	63, 72
Preston v. Toronto R.W. Co.....	11 O.L.R. 56, 13 O.L.R. 369.....	428
Prince's Case, The.....	8 Rep. 1.....	621
Prior v. Moore.....	3 Times L.R. 624.....	305
Pritt v. Connecticut Fire Ins. Co.....	23 A.R. 449.....	658
Prosser v. Edmonds.....	1 Y. & C. 481.....	660
Provident Chemical Works v. Canada Chemical Co.....	4 O.L.R. 545.....	149
Provincial Fisheries, Re.....	26 S.C.R. 444.....	249, 259, 265, 507
Prudam v. Phillips.....	20 Howard's State Trials 355.....	90
Pugh v. Golden Valley R.W. Co.....	12 Ch.D. 274.....	537
Pym v. Campbell.....	6 E. & B. 370.....	104

## Q.

Quebec Skating Club, The v. Her Majesty the Queen.....	3 Ex. C.R. 387.....	622
---	---------------------	-----

NAME OF CASE.	WHERE REPORTED.	PAGE
Queen v. Allan.....	4 B. & S. 915.....	616
Queen v. Barnfield.....	3 Can. C.C. 161.....	502
Queen ex rel. St. Louis v. Reaume.....	26 O.R. 460.....	81
Queen v. Farrant.....	20 Q.B.D. 58.....	614
Queen v. Inhabitants of the Tithing of East Mark.....	11 Q.B. 877.....	335
Queen v. Inhabitants of Township of Bradfield.....	L.R. 9 Q.B. 552.....	340
Queen v. Robertson.....	6 S.C.R. 52..... 251, 254, 255, 263, 265	
Queen v. Sharp.....	5 P.R. 135.....	250, 255
Queen v. Judge of the County Court of Lincolnshire.....	20 Q.B.D. 167.....	418
Queen v. Valleau.....	3 Can. C.C. 435.....	502, 514
Quarman v. Burnett.....	6 M. & W. 499.....	63, 75
Quigley v. Waterloo Manufacturing Co.....	1 O.L.R. 606.....	48
R.		
Race v. Anderson.....	14 A.R. 213.....	612, 613, 614, 617
Radford v. Macdonald.....	18 A.R. 167.....	486
Radley v. London and North Western R.W. Co.....	1 App. Cas. 754.....	425, 433, 435, 445
Randall v. Dopp.....	22 O.R. 422.....	233
Ratte v. Booth.....	14 A.R. 419.....	251
Read v. Brown.....	22 Q.B.D. 128.....	206, 207
Reade v. Lambe.....	6 Ex. 130.....	209
Redfield v. Corporation of Wickham.....	13 App. Cas. 467.....	172, 173
Redway v. McAndrew.....	L.R. 9 Q.B. 74.....	601
"Reeside," The.....	2 Sumn. (U.S.) 567.....	357
Regina v. Bamber.....	5 Q.B. 279.....	387
Regina v. Coulson.....	24 O.R. 246.....	502
Regina v. Coulson.....	27 O.R. 59.....	502, 513, 514
Regina v. Hall.....	8 O.R. 107.....	502, 514
Regina v. General Council of Medical Education and Registration.....	3 E. & E. 525.....	283
Regina v. Hall.....	17 C.P. 282.....	336
Regina v. Howarth.....	24 O.R. 561.....	502, 513
Regina v. Inhabitants of Greenhow.....	1 Q.B.D. 703.....	388, 391
Regina v. Inhabitants of Hornsea.....	1 Dears. C.C. 291.....	387
Regina v. Inhabitants of the Parish of Paul.....	2 Moo. & R. 307.....	388
Regina v. Justin.....	24 O.R. 327.....	635
Regina v. McBride.....	26 O.R. 639, 2 Can. C.C. 544.....	486
Regina v. Meyers.....	3 C.P. 305.....	242, 249, 250, 252, 263
Regina v. Plunkett.....	21 U.C.R. 536.....	335
Regina v. Rankin.....	16 U.C.R. 304.....	336, 343
Regina v. Sharp.....	5 P.R. 135.....	255
Regina v. Stewart.....	17 O.R. 4.....	502, 508, 514, 516, 517, 519
Regina v. Vahey.....	2 Can. C.C. 258.....	489
Regina v. Wycombe R.W. Co.....	L.R. 2 Q.B. 310.....	537
Renaud v. Tourangeau.....	L.R. 2 P.C. 4.....	401
Rex v. Bank of England.....	2 Doug. 526.....	395
Rex v. Burns.....	1 O.L.R. 336.....	486
Rex v. Dawn.....	12 O.L.R. 227.....	486, 488
Rex v. Inhabitants of Landulph.....	1 Moo. & R. 393.....	388
Rex v. Karn.....	5 O.L.R. 704.....	487
Rex v. Lloyd.....	1 Camp. 260, 10 R.R. 674.....	335
Rex v. Miller.....	Not reported.....	44
Rex v. Montague.....	4 B. & C. 598.....	260
Rex v. Pease.....	4 B. & Ad. 30.....	537
Rex v. Sunderland Justices.....	[1901] 2 K.B. 357.....	614
Reynolds v. Tilling.....	19 Times L.R. 539, 20 Times L.R. 57.....	433, 439



NAME OF CASE.	WHERE REPORTED.	PAGE
Ricketts v. The Corporation of the Village of Markdale.....	31 O.R. 610.....	635, 640
Ritz and Village of New Hamburg, Re. . . . .	4 O.L.R. 639.....	9
Roche v. Ryan.....	22 O.R. 107.....	11
Rosher v. Rosher, In re.....	26 Ch.D. 801.....	400, 401, 402
Robert v. His Majesty the King.....	9 Ex. C.R. 21.....	622
Roberts v. Bank of Toronto.....	21 A.R. 629.....	133
Robertson v. Freeman.....	22 U.C.R. 298.....	44
Robertson v. The Queen.....	6 S.C.R. 52.....	265
Rodgers v. Hadley.....	2 H. & C. 227.....	104
Rodway v. Lucas.....	10 Ex. 667.....	194
Rogers v. Hunt.....	10 Ex. 474.....	201
Rose v. College of Physicians.....	5 Br. P.C. 553.....	502
Rosenbaum v. Belson.....	[1900] 2 Ch. 267.....	305
Rosenberg v. Hart.....	33 Ill. App. Ct. 263.....	599, 602
Ross v. Stevenson.....	7 P.R. 126.....	129
Rossiter v. Miller.....	3 App. Cas. 1124.....	306
Rowe v. Corporation of Leeds and Grenville.....	13 C.P. 515.....	166
Rowe v. Titus.....	1 Allen N.B. 226.....	242, 243
Royal College of Physicians v. The General Medical Council.....	62 L.J.N.S. (Q.B.) 329.....	502
Russell, Re.....	8 O.L.R. 481.....	83, 87, 88, 527
Russell v. Lefrancois.....	8 S.C.R. 335.....	67, 179
Russell v. Morgan.....	24 R.I. 134.....	603
Russell v. Russell.....	[1895] P. 315, [1897] A.C. 395.....	570, 575, 579, 581, 593
Ruthven v. Rossin.....	8 Gr. 370.....	95
Rythe, Re.....	6 B. & S. 704.....	287
S.		
Sachs v. Speilman.....	37 Ch.D. 295.....	187
Sadler v. Hanlock.....	4 E. & B. 570.....	64
Salter and Township of Beckwith, In re.....	4 O.L.R. 51.....	81
Sammell v. Wright.....	5 Esp. 263.....	75
Saunders v. City of Toronto.....	26 A.R. 265.....	61, 63, 64, 65, 69, 71, 77
Schendel v. Silver.....	63 Hun. 330.....	146
Schlumberger, In re.....	9 Moo. P.C. 1.....	505
Schneider v. Norris.....	2 M. & S. 286.....	306
Schott v. Harvey.....	105 Penn. 222.....	483
Schwartz v. Winkler.....	13 Man. R. 493.....	232
Schwoob v. Michigan Central R.W. Co. . . . .	13 O.L.R. 548.....	563, 567
Scott v. Dublin and Wicklow R.W. Co. . . . .	11 Ir. C.L.R. 377.....	435, 440, 445
Scott v. Melady.....	27 A.R. 193.....	206, 207
Scragg v. Corporation of the City of London.....	26 U.C.R. 263.....	408
Sculthorpe v. Burn.....	12 Gr. 427.....	524
Seixo v. Provezende.....	L.R. 1 Ch. 192.....	152
Selby v. Pomfret.....	3 D.F. & J. 595.....	129, 134, 138
Seth Padelford v. Provincial Fire Ins.Co.....	3 Rhd. Id. 102.....	545
Seymour v. Lynch.....	7 O.R. 471.....	55
Shanacy and Quinlan, Re.....	28 O.R. 372.....	401
Shanly v. Moore.....	3 P.R. 223.....	597
Sharpe v. Gordon.....	28 Beav. 150.....	57
Sharp v. Wright.....	28 Beav. 150.....	54
Shaw v. St. Thomas.....	18 P.R. 454.....	652
Shea v. Choat.....	2 U.C.R. 211.....	258
Sheba Gold Mining Co. v. Trubshawe.....	[1892] 1 Q.B. 674.....	194
Sheppard Publishing Co., Ltd. The, v. The Press Publishing Co., Ltd. . . . .	10 O.L.R. 243.....	600
Shore v. Wilson.....	9 Cl. & F. 355.....	358
Shuttleworth v. Le Fleming.....	19 C.B.N.S. 687.....	498

NAME OF CASE.	WHERE REPORTED.	PAGE
Sillem v. Thornton.....	3 E. & B. 868.....	544
Simpson v. Lamb.....	7 E. & B. 84.....	659
Sims v. Kelly, Re.....	20 O.R. 291.....	418
Siner v. The Great Western R.W. Co.....	L.R. 4 Ex. 117.....	369
Singer Manufacturing Co. v. Loog.....	8 App. Cas. 15.....	145
Sipperly v. Baucus.....	24 N.Y. 46.....	90
Skelton v. London and North-Western R.W. Co.....	L.R. 2 C.P. 631.....	369, 372
Sklitisky v. Cranston.....	22 O.R. 591.....	11
Smart Infants, Re.....	12 P.R. 635.....	132
Smart v. Smart.....	[1892] A.C. 425.....	592
Smith v. Boyd.....	17 P.R. 463.....	49
Smith v. Clews.....	114 N.Y. 190.....	357
Smith v. Millions.....	16 A.R. 140.....	248
Smith v. Niagara and St. Catharines Railway Co.....	9 O.L.R. 158.....	370
Smith v. South-Eastern R.W. Co.....	[1896] 1 Q.B. 178.....	564
Smith v. London and South-Western R.W. Co.....	L.R. 6 C.P. 14.....	635
Smith v. Whiting.....	3 O.S. 597.....	217
Smurthwaite v. Hannay.....	[1894] A.C. 494.....	195, 198, 201
Smth v. Latham.....	9 Bing. 692.....	44
Soar v. Ashwell.....	[1893] 2 Q.B. 390.....	116
Solmes v. Stafford.....	16 P.R. 78.....	195, 200, 203
Solmes v. Stafford.....	16 P.R. 264.....	201, 203
Soloman v. Mulliner.....	[1901] 1 K.B. 76.....	364
South American and Mexican Co., In re.....	[1895] 1 Ch. 37.....	146
South Ontario Provincial Election, In re.....	18 C.L.T. Occ. N. 321.....	18, 19, 30
South Perth Case.....	2 Ont. Elec. Cas. 30.....	18, 19, 29
South Perth Case.....	2 Ont. Elec. Cas. 144.....	18, 29
South Wentworth Case.....	H.E.C. 531.....	18, 28
Spaight v. Tedcastle.....	6 App. Cas. 217.....	553
Springett v. Ball.....	4 F. & F. 472.....	436
Stalker v. Township of Dunwich.....	15 O.R. 342.....	167
Stanley v. Jones.....	7 Bing. 369.....	659
Stark v. Reid.....	26 O.R. 257.....	141
Starrs v. Her Majesty the Queen.....	1 Ex. C.R. 301.....	622
State v. Fiffing.....	46 Lawyers' Rep. Ann. 334.....	502
State Reservation at Niagara Falls, Re.....	16 Abbott's N.C. (N.Y.) 159, 37 Hun. 507.....	263
Steel v. Burkhardt.....	104 Mass. 59.....	636
Steelsmith v. Gartlan.....	44 L.R. Annot. 107.....	55
Stephens v. Boisscau.....	23 A.R. 230, 26 S.C.R. 437.....	232, 234
Stephens v. London and South-Western R.W. Co.....	18 Q.B.D. 121.....	218
Stephens v. London Street R.W. Co.....	7 O.W.R. 39.....	404
Stephen v. Thurso Police Commissioners.....	2 Ct. of Sess. Cas. 4th series 535.....	64, 77
Stephens v. Thurso Police Commissioners.....	3 Ct. of Sess. Cas., 4th series 542.....	77
Stetson v. Massachusetts Mutual Fire Ins. Co.....	4 Mass. 330.....	545
Stewart v. Guibard.....	6 O.L.R. 262.....	538
Stowe v. Jolliffe.....	L.R. 9 C.P. 734.....	19
Sturges v. Bridgman.....	11 Ch.D. 852.....	494
St. Vincent v. Greenfield.....	15 A.R. 567.....	335, 343
Sutherland, Duke of, v. Heathcote.....	[1892] 1 Ch. 475.....	57
Sutton's Trusts, In re.....	12 Ch.D. 175.....	112
Syers v. Jonas.....	2 Ex. 111.....	355

## T.

Talbot's Trade Mark, In re.....	11 R.P.C. 77.....	145
Taylor v. Ford.....	29 L.T. 392.....	601

NAME OF CASE.	WHERE REPORTED.	PAGE
Taylor v. Great Northern R.W. Co.....	L.R. 1 C.P. 385.....	217
Taylor v. Magrath.....	10 O.R. 669.....	524
Taylor v. Taylor.....	23 L.J.N.S. Ch. 255.....	145
Taylor v. Willans.....	2 B. & Ad. 845.....	333
Telford v. Morrison.....	2 Addams 319.....	87
Temperton v. Russell.....	9 Times L.R. 319.....	49
Thackery v. Township of Raleigh.....	1 Clarke and Scully's Drainage Cases 328.....	229
Thibaudeau v. Garland.....	27 O.R. 391.....	233
Thomas v. Canadian Pacific R.W. Co....	8 O.W.R. 93.....	599
Thomas and Shannon, Re.....	30 O.R. 49.....	401
Thompson v. Bank of Nova Scotia.....	13 C.L.T. Occ. N. 311.....	599
Thompson v. Cushing.....	30 O.R. 123.....	537, 539
Thompson v. Great Western R.W. Co....	24 C.P. 429.....	635
Tickle v. Brown.....	4 A. & E. 369.....	495
Tolhurst v. The Associated Portland Cement Manufacturers, Ltd.....	[1902] 2 K.B. 660, [1903] A.C. 414.....	657
Toller v. Spiers and Pond.....	19 Times L.R. 119.....	483, 484
Tooke v. Bergeron.....	27 S.C.R. 567.....	554
Toronto, City of, v. Toronto Electric Co.	11 O.L.R. 310.....	591
Toronto Railway Co. v. Corporation of the City of Toronto.....	[1904] A.C. 809.....	408
Toronto R.W. Co. v. Robinson.....	Can. Sup. Ct. Prac. 222.....	589
Towers v. African Sun Co.....	[1904] 1 Ch. 558.....	35
Town of Cornwall v. Derochie.....	24 S.C.R. 301.....	424
Trall & Sons v. Actieselshabat Dal- beattie, Ltd.....	6 F. 798.....	659
Trent Valley Canal, Re.....	11 O.R. 687.....	336
Trent Valley Canal, Re.....	12 O.R. 153.....	255
Trimble v. Williamson.....	49 Ala. 525.....	134
Trusts and Guarantee Co. v. Hart.....	2 O.L.R. 251, 32 S.C.R. 553.....	178
Trusts and Loan Co. v. Reynolds.....	2 Ch. Ch. 41.....	130
Trusts Corporation of Ontario v. Rider.	24 A.R. 157.....	654
Turner v. Allday.....	Tyr. & Gr. 819.....	57
Turner v. Ambler.....	10 Q.B. 252.....	323, 333
Turner v. Bayley.....	4 De G.J. & S. 332.....	188
Tudgay v. Sampson.....	30 L.T.N.S. 262.....	357
Tuff v. Warman.....	5 C.B.N.S. 573.....	435, 445
Turberville v. Stampe.....	1 Lord Raym. 264.....	76
Tyers v. Rosedale and Ferryhill Iron Co.	L.R. 8 Ex. 305, L.R. 10 Ex. 195..	358
Tyson v. Abercrombie.....	16 O.R. 98.....	105

## U.

Uniache v. Dickson.....	2 N.S.L.R. (James) 287.....	258
Union Bank of London v. Ingram.....	20 Ch.D. 463.....	130
Union Colliery Co. of British Columbia v. Attorney-General of British Columbia.....	27 S.C.R. 637.....	507
Union Lighterage Co. v. London Graving Dock Co.....	[1902] 2 Ch. 557.....	496
United States v. Chandler Dunbar Co..	Wanty, J., July 20, 1905, not reported.....	257
United States v. Rio Grande Dam and Irrigation Co.....	174 U.S.R. 690.....	244

## V.

Vallee v. Grand Trunk R.W. Co.....	1 O.L.R. 224.....	562
Venables v. Smith.....	2 Q.B.D. 279.....	63, 64, 69, 74
Vicar and Churchwardens of St. Botolph, Aldersgate Without, The, v. The Parishioners of the same.....	[1900] P. 69.....	408



NAME OF CASE.	WHERE REPORTED.	PAGE
Videau v. Westover.....	29 O.R. 1.....	132
Vineberg v. Guardian Fire and Life Assurance Co.....	19 A.R. 293.....	611, 612, 614, 617
Vose v. Morton.....	5 Gray (Mass.) 594.....	357
Vulcan v. Myers.....	139 N.Y. 364.....	145

## W.

Wace v. Mollard.....	21 L.J.Ch. 355.....	2
Wadsworth v. Smith.....	11 Me. 278.....	243
Waland v. Elkins.....	1 Stark 272.....	77
Waller v. South-Eastern R.W. Co.....	2 H. & C. 102.....	552
Walmesley v. Walmesley.....	62 L.T.N.S. 152.....	580
Wanless v. The North-Eastern R.W. Co.....	L.R. 6 Q.B. 481, 7 H.L. 12.....	370
Warin v. London and Canadian.....	7 O.R. 706.....	254
Warner v. Wellington.....	3 Drew. 523.....	415
Warnock v. Kloepper.....	15 A.R. 324.....	232
Washington, Re.....	23 O.R. 299.....	279, 284, 296
Waterous and City of Brantford, Re.....	3 O.W.R. 355.....	10
Watkin v. Brent.....	1 Curt. 264.....	83
Watkins v. Brent.....	1 M. & Cr. 97.....	83
Watt v. Clark.....	18 O.R. 602.....	599, 600, 601
Waynes Merthyr Co. v. Radford.....	[1896] 1 Ch. 29.....	187
Webster v. Foley.....	21 S.C.R. 580.....	552
Wells v. Lindop.....	15 A.R. 695.....	424
Wendon v. London County Council.....	[1894] 1 Q.B. 812.....	408
Western Canada Loan and Savings Co. v. Court.....	25 Gr. 151.....	112
West York Case.....	H.E.C. 156.....	19
Whitewood v. Whitewood.....	19 P.R. 183.....	112, 114
Whyte v. Ahrens.....	26 Ch.D. 717.....	187
Wicker v. Hume.....	7 H.L.C. 124.....	258
Wildman v. Tait.....	32 O.R. 274.....	320
Wilkinson v. Howel.....	Moo. & M. 495.....	601
Wilks v. Wood.....	[1892] 1 Q.B. 674.....	194, 201
William Blackey, Ltd., v. Elite Costume Co., Ltd.....	9 O.L.R. 382.....	206
Williams, In re, Williams v. Williams.....	[1897] 2 Ch. 12.....	2
Williams, Re.....	27 O.R. 405.....	83, 88
Williams v. Richards.....	3 C. & R. 81.....	429
Wills v. Belle Ewart Ice Co.....	12 O.L.R. 526.....	469
Wilson v. Fleming.....	1 O.L.R. 599.....	597
Wilson v. Hamilton Steel and Iron Co.....	8 O.W.R. 525.....	567
Wilson v. Moore.....	1 My. & K. 337.....	116
Winstanley, Re.....	6 O.R. 315.....	400
Winter v. Brockwell.....	8 East. 308.....	55
Wisner v. Wisner.....	22 U.C.R. 446.....	104
Wood v. Joselin.....	18 A.R. 59.....	133
Wood v. Manley.....	11 A. & E. 34.....	55
Woods v. Toronto Bolt and Forge Co.....	6 O.W.R. 637.....	552
Wotherspoon v. Currie.....	L.R. 5 H.L. 508.....	145, 151, 152, 153
Wright v. McCabe.....	30 O.R. 390.....	418
Wycherley v. Wycherley.....	2 Ed. 174.....	55
Wye Valley R.W. Co. v. Hawes.....	16 Ch.D. 489.....	35, 39
Wynne v. Tempest.....	[1897] 1 Ch. 110.....	39

## Y.

Yeap Cheah Neo v. Ong Ching Neo.....	L.R. 6 P.C. 381.....	258
Youghioghaney Bridge Co. v. Pittsburg and Connellsville R.W. Co.....	201 Penn. St. 457.....	538
Young and Township of Binbrook, Re.....	31 O.R. 108.....	81
Young v. Austen.....	L.R. 4 C.P. 553.....	104
Young v. Nichol.....	9 O.R. 347.....	323, 324, 326, 333



# REPORTS OF CASES

DETERMINED IN THE

## COURT OF APPEAL

AND IN THE

### HIGH COURT OF JUSTICE FOR ONTARIO.

[DIVISIONAL COURT.]

PETTYPIECE V. TURLEY.

D. C.

1906

Oct. 31.

*Will—Construction—Trust—Precatory Trust—Power—Execution of.*

A testator whose mother owned an estate for life in a farm in which he had the remainder in fee, by his will devised to her his interest in the farm "to be disposed of as she may deem most fit and proper for the best interest of my brothers and sisters." The mother after his death conveyed the farm in fee simple to one of his sisters, the expressed consideration being one dollar and natural love and affection, and the deed containing no reference whatever to the will, or anything indicating on its face that it was executed in pursuance of a power or trust:—

*Held*, that it was not necessary to determine whether the mother took absolutely, or whether, if she had not taken absolutely, a trust was created or a power, inasmuch as even if a trust was created in the mother, the conveyance by her operated, and was intended to operate, as an execution of the trust, although the whole of the property was granted to one daughter only.

THIS was an appeal by the plaintiff from the judgment of Falconbridge, C.J.K.B., dismissing this action with costs.

The circumstances of the case are set out in the judgment of this Court.

The appeal was argued on October 29th, 1906, before MEREDITH, C.J.C.P., and MACMAHON and ANGLIN, JJ.

*F. E. Hodgins*, K.C., for the appellant, contended that there was an express and imperative trust in the mother of the testator, and that she had to exercise it in favour of his brothers and sisters, each of whom was entitled to some benefit, though the quantum was in her discretion; that it was different from a power or a trust to leave "among" a number of people; that there was a clear direction to dispose of the property, and all the elements of a trust, and that the conveyance in question was inoperative as an exercise



D. C.  
 1906  
 PETTYPIECE  
 v.  
 TURLEY.

of the trust: *Comisky v. Bowring-Hanbury*, [1905] A.C. 84; *In re Oldfield*, *Oldfield v. Oldfield*, [1904] 1 Ch. 549; *In re Williams*, *Williams v. Williams*, [1897] 2 Ch. 12, 18; *Archibald v. Wright* (1838), 9 Sim. 161; *Nelles v. Elliot* (1878), 25 Gr. 329; *Wace v. Mollard* (1851), 21 L.J.Ch. 355; *Barnes v. Grant* (1857), 26 L.J. Ch. 92; *Longmore v. Broom* (1802), 7 Ves. 124; *Lambe v. Eames* (1871), L.R. 10 Eq. 267, 6 Ch. 597; *In re Hutchinson & Tenant* (1878), 8 Ch.D. 540; *Re McDougall* (1904), 8 O.L.R. 640; *Le Marchant v. Le Marchant* (1874), L.R. 14 Eq. 414.

*H. E. Rose*, for the respondents, contended that the cases cited were against considering the words here as constituting a trust; that the mother was clearly meant to be more than a trustee; that the words of affection indicated this; that even if a trust, she was entitled to select the best out of the brothers and sisters. He referred to *Mackett v. Mackett* (1872), L.R. 14 Eq. 49; *In re Diggles*, *Gregory v. Edmondson* (1888), 39 Ch.D. 253; *In re Williams*, *Williams v. Williams*, [1897] 2 Ch. 12.

*Hodgins*, in reply.

October 31. The judgment of the Court was delivered by MEREDITH, C.J.:—This is an appeal by the plaintiff from the judgment of the Chief Justice of the King's Bench pronounced on May 15th, 1906, dismissing the action with costs.

The lands in question consist of a farm, being the south-east quarter of lot No. 4 in the 4th concession of the township of Anderdon, in the county of Essex, which were owned by Thomas Pettypiece, the father of the appellant and of the respondent.

By his will, made on July 18th, 1882, Thomas Pettypiece devised the farm to his wife for life, with remainder in fee to his son Frederick Pettypiece, the estate so devised to his son being subject to the payment of legacies to his two sisters.

Frederick Pettypiece subsequently died, having made his will on July 18th, 1885, by which he gave and devised his interest in the farm to his mother, the tenant for life, the devise being contained in these words:

"I give, devise and bequeath to my dearly affectionate mother, to her, her heirs and assigns absolutely and forever, all my right, title, interest in and to the south-east quarter of lot number four in the fourth concession of the said township of Anderdon, be-

queathed to me by will by my deceased father Thomas Pettypiece, said will bearing date October 9th, A.D. 1882, to be disposed of by my said mother Mary Pettypiece as she may deem most fit and proper for the best interest of my brothers and sisters, and enjoining my said mother to pay to my two sisters the legacies binding on me by the aforesaid mentioned will of my deceased father."

The mother by a conveyance dated October 24th, 1899, conveyed the farm in fee simple to the defendant, who is one of the sisters of Frederick Pettypiece. The conveyance is not produced, but it is said to be expressed to be made in consideration of one dollar and natural love and affection, and contains no reference to the will, nor upon its face does it indicate any intention to execute the power or trust, whichever it may be, if it was either, created by the will of Frederick Pettypiece.

The action of the appellant was brought for the purpose of having it declared that the lands in question passed to his mother upon an express trust entitling him and his sisters to have the land divided between them, and seeking to have it declared that the conveyance to the respondent was inoperative, and to have it set aside and a declaration that the appellant is entitled to an undivided half of the farm, and for other relief.

As I have said, the learned Chief Justice dismissed the action. He gave a very short judgment, expressing no opinion as to what was the proper construction of the will, or as to whether the conveyance operated as an execution of the trust or power, but apparently determined the case upon the ground that, assuming it to be a trust or a power, the appellant had received a benefit out of the property, and that there was no breach of trust, therefore, in conveying the residue of the property to the respondent.

It was conceded by Mr. Hodgins that if the mother had appointed even the smallest share,—he went so far as to say even a dollar,—to the appellant, that would have been a good exercise of the discretion vested in her by the will.

In the view we take it is unnecessary to determine whether the mother took absolutely, or whether, if she did not take absolutely, a trust was created or a power vested in her.

Assuming in favour of the appellant that a trust was created,—which is putting the case on the highest ground that it can be put for him,—we think that the conveyance by the mother to the re-

D. C.  
1906  
PETTYPIECE  
v.  
TURLEY.  
Meredith, C.J.

D. C.

1906

PETTYPIECE

v.

TURLEY.

Meredith, C.J.

spondent operated and was intended to operate as an execution of the trust.

There are cases upon powers, the principle of which would seem to be equally applicable to the case of a trust.

In Farwell on Powers, 2nd ed., at p. 176, dealing with the question of the requisites for the execution of powers, the law is stated in this way:

"The instrument must refer either to the power, or to the property subject to the power; or it must affect to deal with some property in general terms, not defining it, under such circumstances that it cannot have effect except upon the property comprised in the power."

Now, although this instrument does not refer to the trust or power, it refers to the property which was the subject of it, and, possibly, it may be supported for the other reason which is one that may support the execution of a power, that it affects to deal with property under such circumstances that it cannot have effect except upon the property comprised in the power.

Then, at p. 266, referring to cases in which a person alleged to have executed the power has both a power and an interest, after stating the general rule to be that:

"If a man has both a power and an interest, and does an act generally as owner of the land without reference to the power, the land shall pass by virtue of his ownership, not of his power," in a note to that rule it is said, after referring to the principle of the case of *Countess Dowager of Roscommon v. Fowke* (1745), 6 Br. P.C. 158: "On the same principle, where a man has both a power and an interest, and he creates an estate which will not have an effectual continuance in point of time if it be fed out of his interest, it shall take effect by force of the power."

Here, the conveyance was, as I have said, a conveyance of an estate in fee simple. The only interest the mother had was an estate for her own life, and, therefore, the conveyance created an estate which would not have effectual continuance in point of time if it had been fed out of the mother's own interest, and it, therefore, took effect by virtue of the power, or in the execution of the trust, if it was a trust.

The next question is whether the power or the trust was well executed in the manner in which the mother assumed to exercise it.

It will be observed that the language of the testator confers a very wide discretion upon the devisee. It is not a case of a direction that the property is to be divided between the brothers and sisters, or a direction that they are to have any portion of it; it is that it is to be disposed of by the mother as she may deem most fit and proper for the best interest of the brother and sisters.

Now, I apprehend that under such a power it would be quite open,—supposing that the family had been left in such a condition that the brothers and sisters were young,—to the devisee to have sold the farm and spent the money in such proportions as she saw fit for the maintenance and education of the children, and that that would have been a proper disposition of the property and in accordance with the provisions of the will.

In the case of *Civil v. Rich* (1680), 1 Ch. Cas. 309, the language of the will was:

“All the rest of my estate I give to A.B. to give to my children and grandchildren, according to their demerits”—a stronger case than is this for the appellant, because the language there is “to give to my children.” The way in which A.B. had dealt with the property was this: The devisee, who was the heir and executor, gave the land to one, omitting the rest; and the question was whether that was a disposition in accordance with the power, and it “was much argued” as the report states. The Lord Chancellor held that the power was well exercised.

In the case of *Burrell v. Burrell* (1768), 1 Ambl. 660, the devise was to the wife, to the end that she might give her children such fortunes as she might think proper or they best deserve. There being five children of the testator, and the eldest being provided for, an appointment of a guinea to him, and the rest among the other children, was held a good appointment.

That case was considered in *Kemp v. Kemp* (1801), 5 Ves. 849, at p. 859, and in referring to it, the Vice-Chancellor says:

“The last case I shall take notice of is that, which has been so much commented upon, *Burrell v. Burrell*. The testator gave all his real and personal estate to his wife, to the end she might give his children such fortunes as she should think proper, or they best deserve; to whom he charged his sons and daughters to be dutiful and obedient, and loving and affectionate to each other. The son had an estate of £400 a year. The wife gave two daughters £200

D. C.

1906

PETTYPIECE

v.

TURLEY.

Meredith, C.J.



D. C.

1906

PETTYPIECE

v.

TURLEY.

Meredith, C.J.

each; to the son a guinea; and the remainder to two other daughters. It is impossible to suppose that Lord Camden laid any stress upon the guinea. I cannot conceive that he considered that as any thing; for it is now too well settled, and it is imposed on every Judge as an obligation, whatever may be the inclination of his own opinion, that, though a gift of any part is a good execution at law, yet in equity, unless it is substantial and real, it is the same as no execution. The words of the report leave it a little doubtful. It states two reasons; and concludes, that, Lord Camden being of the same opinion, the bill was dismissed. Lord Camden, as I conceive, was of opinion, that these words were so ample, that if she thought fit to give nothing to one, she might so execute her power. I will not say what my own opinion would have been. I am willing to subscribe to that of Lord Camden upon such a doubtful question; being perfectly satisfied that in setting aside these appointments, criticising upon the words 'to and amongst,' etc., and the rule as to illusory shares, the Court goes against the intention."

In *McGibbon v. Abbott* (1885), which was an appeal from Lower Canada to the Privy Council, reported in 10 App.Cas. 653, the cases of *Kemp v. Kemp* and *Burrell v. Burrell* and *Civil v. Rich* are referred to apparently with approval. No doubt in that case it was a question of Lower Canada law, and the English doctrine as to illusory appointments did not prevail in that Province.

At p. 660, Sir Barnes Peacock, in delivering the judgment of the Court, said:

"In England, Lord Alvanley, in the case of *Kemp v. Kemp*, in holding a power to be non-exclusive, upon finding a current of authorities against the words being construed as giving an exclusive power, observed: 'My inclination is strong to support the execution of the power if I could consistently with the rules I find established'; and on referring to the case of *Burrell v. Burrell*, in which a testator gave all his real and personal estate to his wife, to the end that she 'might give his children such fortunes as she should think proper,' remarked"—then he quotes the observation as to Lord Camden which I have already quoted, and then proceeds: "In the case then before him, Lord Alvanley held that the power was non-exclusive, but at the conclusion of his judgment, having given his reasons at length, he added,—'For these reasons, but with less satisfaction than I have had in any other judgment that I have given, being satisfied

that the person creating the power meant a much larger power than I can hold the person executing it had, I must declare the appointment void.' In Sugden on Powers it is said, 'In many cases an exclusive appointment may be authorized by the apparent intention of the donor, although no words of exclusion are expressly used.'" Then there is a reference to *Civil v. Rich*, 1 Ch. Cas. 309.

The only other case which it is necessary to refer to is *Crockett v. Crockett* (1847), 2 Ph. 553. There the testator by his will directed that all his property should be at the disposal of his wife for herself and her children. At p. 561 Lord Chancellor Cottenham says: "This being so, it remains to be considered what are the rights and interests of the widow and children in the fund,—a question which, if to be decided upon the terms of the will, would be one of great difficulty, and upon which the authorities and opinions of Judges have widely differed. I have, however, the satisfaction of finding that I am not in this case called upon to decide this question. The mother, according to my construction of the will and the authorities above referred to, had a personal interest in the fund; and, as between herself and her children, she was either a trustee with a large discretion as to the application of the fund, or she had a power in favour of the children subject to a life estate in herself."

We think, therefore, that the conclusion which the learned Chief Justice reached, that the plaintiff had failed to make out his case, was right, and that the judgment must be affirmed, and the appeal dismissed.

A. H. F. L.

D. C.  
1906  
PETTYPIECE  
v.  
TURLEY.  
Meredith, C.J.

[BOYD, C.]

1906

DRIFFILL v. OUGH.

Nov. 1.

*Parties—Fraudulent Conveyance—Settlement of Plaintiff's Debt—Addition of New Creditor as Co-plaintiff—Con. Rules 206, 313.*

Where a creditor, who has brought an action on behalf of himself and other creditors to vacate a transfer of property, has before judgment received payment of his debt, but not of his costs, the Court will not sanction the addition of another creditor as a co-plaintiff, but will allow the controversy to be settled as between the plaintiff and the defendants, leaving the creditor seeking to intervene to begin an independent action.

THIS was a creditor's action to set aside a chattel mortgage alleged to be in fraud of creditors, and an interim injunction had been obtained to restrain a pending sale of the mortgaged property, which injunction the plaintiff, on November 1st, 1906, moved before BOYD, C., in Weekly Court, to continue until the trial.

The plaintiff was a creditor in respect to a note made by the mortgagee and the mortgagor, and the mortgagee, before the return of the present motion, paid the amount due to the plaintiff's solicitor.

On return of the motion—

*W. E. Middleton*, for the plaintiff, pointed out that the note had been paid, and asked that an order be made adding or substituting William Mackie, another creditor, as plaintiff; and contended that as the plaintiff's costs had not been paid she was entitled to go on with the action, and that any other creditor could ask to be substituted in her place and carry on the proceedings.

*A. E. Scanlon*, for the defendants, contended that no such practice was provided for in the rules, and that the plaintiff's action was at an end; and that, while what was now asked might be done after judgment obtained, it could not be done before the plaintiff in the class action had obtained judgment: *Macdonald v. City of Toronto* (1897), 18 P.R. 17; *Canadian Bank of Commerce v. Tinning* (1893), 15 P.R. 401.

November 1. BOYD, C.:—This is an action by one creditor on behalf of all other simple contract creditors to vacate a transfer of property alleged to be in fraud of creditors. The named plaintiff has been settled with by the defendant so far as to have received

payment of the debt. No settlement has been made as to costs and the plaintiff does not seek to dismiss the action, but is willing that another unpaid creditor should be added as a co-plaintiff.

According to the well settled practice in creditors' class suits, the creditor named as plaintiff is up to judgment, master of the proceedings as *dominus litis*, and other creditors have before judgment the right to begin actions each for himself, because they cannot prevent the original creditor plaintiff from stopping or settling his action before judgment. This is very fully discussed by Wilson, C.J., in *M'Pherson v. Gedge* (1883), 4 O.R. 246, 256, and referred to in *Re Ritz and Village of New Hamburg* (1902), 4 O.L.R. 639, 642. No doubt under the present practice the court would not sanction a separate action by every creditor, but would take steps to insure the prosecution of one for the benefit of all, as is pointed out by Kekewich, J., in *In re Alpha Company, Limited, Ward v. Alpha Company*, [1903] 1 Ch. 203 at p. 207. In the present instance the course of the Court would be to allow the controversy to be settled as between the named plaintiff and the defendants, as was done in *Pemberton v. Topham* (1838), 1 Beav. 316, 318. And the proper course for the creditor now seeking to intervene, would be to begin an independent action.

There are general orders, such as 206 and 313,\* which give much discretionary power as to the substitution and addition of parties, but I incline to think they do not cover or were intended to cover such an application as the present. I make no order to change parties, but give no costs of the motion, nor do I vacate the injunction as long as the present action is pending.

\* Con. Rule 206 . . .

2. The Court or a Judge may, at any stage of the proceedings . . . order that the name of a plaintiff or defendant improperly joined, be struck out, and that any person who ought to have been joined, or whose presence is necessary in order to enable the Court effectually and completely to adjudicate upon the questions involved in the action, be added as plaintiff or defendant. . . .

313. Where an action has been commenced in the name of the wrong person as plaintiff, or where it is doubtful where it has been commenced in the name of the right plaintiff, the court or a Judge, if satisfied that it has been so commenced through a *bonâ fide* mistake, and that it is necessary for the determination of the real matter in dispute so to do may . . . order any other person to be substituted or added as plaintiff upon such terms as may seem just.

Boyd, C.

1906

DRIFILL  
v.  
OUGH.



[BOYD, C.]

1906

Oct. 29.

MCGREGOR v. THE MUNICIPAL CORPORATION OF THE  
VILLAGE OF WATFORD ET AL.

*Highway—Dedication—Plan—Registration Before Incorporation—R.S.O. 1887, sec. 152, sub-sec. 62.*

A plan shewing the *locus in quo* as a street was made and filed before, but practically contemporaneously with, the locality being set apart as an incorporated village, the former being on June 3rd, 1873, the latter on June 25th, 1873. The lots were first sold under the plan in 1876. Subsequent legislation which was retroactive declared that allowances for roads laid out in cities, towns and villages, fronting upon which lots had been sold, should be public highways:—

*Held*, that the road in question was a public highway and subject to the jurisdiction of the municipality.

THIS was an action brought against the above corporation to quash a by-law by which the defendants had assumed to deal with a certain plot of land in the village as a public highway for the alleged purpose of closing the same, and for an injunction restraining them from further entering on or dealing with the plot, under the circumstances mentioned in the judgment.

The action was tried before BOYD, C., without a jury, at Sarnia, on October 16th, 1906.

*T. G. Meredith*, K.C., for the plaintiff, referred to *Gooderham v. City of Toronto* (1892-5), 19 A.R. 641, 660, 25 S.C.R. 246, 259; *In re Morton and The Corporation of the City of St. Thomas* (1881), 6 A.R. 323; *Pells v. Boswell* (1885), 8 O.R. 680; *Brown v. Bushey* (1894), 25 O.R. 612, 616; *Re Waterous and City of Brantford* (1904), 3 O.W.R. 355; *Re Laplante and Corporation of Peterborough* (1884), 5 O.R. 634.

*J. Cowan*, K.C., for the defendant corporation.

*W. J. Hanna*, for the defendant Kelly.

October 29. BOYD, C.:—Having referred to cases cited, I retain the opinion expressed at the trial that the road in question was a public highway subject to the jurisdiction of the municipality, and the judgment provisionally announced should be made absolute.

The *locus in quo* was marked as a street on a registered plan made and filed, no doubt, while yet the locality was part of the township, but yet practically contemporaneously with its being set apart as an incorporated village. The plan filed on June 3rd, 1873, was no doubt in actual anticipation of the incorporation of the village, which was consummated on June 25th, 1873. The first sale of lots made in recognition and affirmance of the plan by the owner was in 1876. Subsequent legislation which was retroactive declared that allowances for roads which had been or might be laid out in cities, towns and villages, and fronting upon which lots have been sold, should become public highways. See R.S.O. (1887) ch. 152, sec. 62; *Roche v. Ryan* (1891), 22 O.R. 107; *Sklitzsky v. Cranston* (1892), *ibid.* 591, 593; and *Gooderham v. Corporation of the City of Toronto*, 25 S.C.R. 246, at pp. 261, 262. I am disposed to hold also, if it was necessary, that the road in question laid out in 1873 has been so used and controlled by the municipality and so abandoned by the owner and his successors in title, as to entitle the defendants to deal with it as they have done. These matters I commented on at the close of the argument.

Judgment is to dismiss the action with one set of costs, and two counsel fees, senior and junior, to the defendants.

A. H. F. L.

Boyd, C.

1906

McGREGOR  
v.  
VILLAGE OF  
WATFORD.

## [DIVISIONAL COURT.]

D. C.

1906

Sept. 20.

Oct. 1.

THE CORPORATION OF THE CITY OF TORONTO

v.

THE GRAND TRUNK R.W. CO. ET AL.

*Costs—Taxation—Preparing for Trial—Searches for Missing Documents—  
Party and Party Costs—Tariff—Con. Rule 1178.*

In this action a certain contract and certain plans of material importance were lost, and the plaintiffs employed two of their former solicitors to try and find them, which they succeeded in doing, and they were put in evidence at the trial. For these services a sum of \$350 was paid to them:—  
*Held*, that this expenditure was properly taxable among the plaintiffs' party and party costs, though not specially provided for in the tariff.

THIS was a motion by the Grand Trunk R.W. Co. of Canada by way of appeal from an order of Boyd, C., of September 20th, 1906, dismissing an appeal of the railway company from the certificate of Mr. J. H. Thom, senior taxing officer at Toronto, whereby he allowed to the plaintiffs, and to the Canadian Pacific R.W. Co., defendants in this action, on the taxation of costs herein, the sum of \$350 paid by the plaintiffs and the Canadian Pacific R.W. Co., in connection with the preparations for the trial of this action.

It appeared that it was necessary, in connection with this action, to make a lengthy and careful investigation into the early history of the Toronto Esplanade and the contracts and agreements between the city and the various railway companies relating thereto, for the purpose of preparing the case of the plaintiffs and the Canadian Pacific R.W. Co., who were parties defendant, to meet the defences raised by the Grand Trunk R.W. Co.; in the course of such investigation it was found that a certain contract of January 4th, 1854, and the plans therein referred to, were lost and had disappeared for some years from the records of the City Hall; that Mr. W. G. McWilliams and Mr. Clarke Gamble, two former solicitors of the city of Toronto, were the only persons who could give any assistance in procuring the missing documents and plans, and were employed by the present appellants to make search and enquiry in reference to them; that Mr. McWilliams occupied half his time from the beginning of September to the middle of November, 1906, in the matter, and examined the records of the city, the proceedings in certain actions,

the records of the Crown Lands Department, and the papers in the possession of Mr. Clarke Gamble, and made enquiries from numerous persons formerly connected with the business of the city, that he was engaged 20 days, and charged \$400; that as a result a copy of the missing contract with the accompanying plan was found in the Crown Lands Department, and was subsequently admitted by the parties and copies used in evidence at the trial of this action; that through the same agency, other missing plans were found, and used in evidence at the trial, and that without them it would have been impossible to obtain a proper understanding of the location of the different works and railway rights of way referred to in the pleadings, and the contracts and statutes relating to the matters in question in this action; and that Mr. Clarke Gamble was paid \$50 for the time occupied in searches and consultation.

The above were the services in respect to which the costs objected to on this appeal were incurred; and in the notice of appeal it was expressed to be upon the grounds "that the said costs were incurred in procuring evidence, there being no provision in the Consolidated Rules of practice or in the tariff of costs providing for the allowance of such costs upon a party and party taxation."

The learned Chancellor delivered the following judgment.

September 20. *BOYD, C.*:—In a book of great accuracy, it is said that searches for pedigrees and for ancient records, charters or other documents may, if successful, be allowed between party and party—*Marshall on Costs*, 2nd ed. (1862), p. 285. This charge, though not expressly provided for in our tariff of costs, is not necessarily excluded therefrom; it is in fact by the practice of the courts a recognized item to be allowed in a proper case according to the discretion of the taxing officer. Rule 1178 makes the tariff conclusive in respect of the matters thereby provided for, but it does not mean to exclude other charges which may be proper though omitted therefrom.

In *Bastard v. Smith* (1839), 10 A. & E., 213, a charge of £93 paid to a gentleman of the Chapter House for making searches, etc., was allowed, although it was objected to on the ground that it was not properly an item between party and party to charge for such precautionary measures as searching for evidence. The distinction is well marked between such instances of successful

D. C.

1906

TORONTO

v.

GRAND  
TRUNK  
R. W. Co.



D. C.  
 1906  
 TORONTO  
 v.  
 GRAND  
 TRUNK  
 R.W.CO.  
 —  
 Boyd, C.

search for existing evidence in the shape of lost or mislaid documents and preparation being made for giving evidence by preliminary experiment or investigation. Such was the case of *McGannon v. Clarke* (1883), 9 P.R. 555, where the charges claimed were in order to qualify one to become a witness. These unless special provision is made for them by rule or tariff are not proper items to be paid by the opposite party. Item 142\* of the tariff is perhaps wide enough to cover the case of searches out of court in different places by competent persons in the case of material documents which have got astray from the proper custody. But without explicit directions it was the practice to allow these searches for existing documents according to the course of the court in dealing with costs—see this elucidated in Archbold's *Queen's Bench Practice*, 14 ed., vol. I., p. 703, note "u." See *Churton v. Frewen* (1867), 15 W.R. 559. The documents searched for and found in this case were, it is not disputed, of vital importance, and the efforts made and expenses incurred were reasonable in themselves.

I think that the ruling and allowance of the taxing master should be upheld, but it is not a case to give costs against the appellants.

An appeal from this decision was argued on October 1st, 1906, before a Divisional Court composed of MEREDITH, C.J.C.P., and MACMAHON and TEETZEL, JJ.

*R. C. H. Cassels*, for the Grand Trunk R.W. Co., contended that the costs in question were costs of preparing for trial, and not taxable between party and party: *McGannon v. Clarke*, 9 P.R. 555; that though such costs were taxable under the old common law rule, they are only taxable in England under a portion of a rule of court allowing costs of preparing evidence,—a clause which our rules have not adopted: Eng. O. 65, R. 27 (9), (Rule 1002 [9]); that costs of preparing for trial have never been allowed here, at any rate since the Judicature Act. He also referred to *Duke of Beaufort v. Lord Ashburnham* (1863), 13 C.B.N.S.

\* 142. When it has been satisfactorily proved that proceedings have been taken by solicitors out of Court to expedite proceedings, save costs, or compromise actions, an allowance is to be made therefor in the discretion of the taxing officer in Toronto [or Judge of County Court in C. C. cases.]

598, and the comment on it in *Nolan v. Copeman* (1873), L.R. 8 Q.B. 85.

*Shirley Denison*, for the Canadian Pacific R.W. Co., contended that the old common law rule under which such costs were taxable still exists in England and here notwithstanding the Judicature Act: Archbold's Queen's Bench Practice, 12th ed., at p. 516; *ibid.* 14th ed., p. 703, n.; that under this rule costs of obtaining translations, and of searches for ancient documents, and of copies of pedigrees may be allowed; that our tariff of costs is not exclusive in its items: Con. Rule 1178; *Ball v. Crompton Corset Co.* (1886), 11 P.R. 256.

*W. Johnston*, for the city of Toronto, relied on the reasons in the judgment of Boyd, C.; and on the distinction that this was not a case of a witness qualifying himself to give evidence, but of the search for documents which were themselves evidence.

October 1. The judgment of the Court was delivered by MEREDITH, C.J.:—We think the order of the learned Chancellor is right and must be affirmed. It is conceded that prior to the Judicature Act the rule at common law was to allow such expenses as are in question here. They are not expenses of qualifying a witness for giving his evidence, which apparently were never in this country properly allowable between party and party.

That rule Mr. Cassels endeavours to get rid of, but I think unsuccessfully. He relies entirely upon the circumstance that the framers of our rules deliberately refrained from adopting certain words of the English rule which would have been clearly wide enough to cover such an allowance as this, and argues from that that our rules were intended to exclude the right to recover such expenses.

I think, however, that even if there had been an entire departure from the language of the English rule, in other words, if the English rule had covered only such expenses as are in question and had been simply an affirmance of the old common law rule, it would have been difficult to say that because that had not been incorporated in our rules, there was a repeal by implication of the existing practice. That would be too strong a deduction to draw; but when one considers that the English rule goes much further than the old common law rule, and allows to some extent, at all events,

D. C.

1906

TORONTO

v.

GRAND  
TRUNK  
R.W.Co.

D. C.

1906

TORONTO

v.

GRAND

TRUNK

R.W.Co.

Meredith, C.J.

expenses of qualifying a witness for giving his evidence, it is plain that Mr. Cassels' argument cannot prevail.

Apparently what the framers of our rules thought was that it was not wise to extend the rules which applied to the common law courts to the extent to which they had been extended in England, and therefore they omitted the wide words which are found in the English rule.

I agree in the view of the Chancellor that our rule is not exhaustive in the sense in which he dealt with it in the *Crompton Corset Company* case, 11 P.R. 256. There is nothing in the tariff to exclude the allowance of such items as these. The tariff does say that in respect of items dealt with by it, no greater sums shall be allowed than those fixed by the tariff, but it does not say that no allowance shall be made in respect of matters not dealt with in the tariff.

We think that the order of the Chancellor must be affirmed with costs. The point is new, and the Chancellor gave no costs against the appellants, but they were not satisfied, and will have to suffer the consequences as to costs which ordinarily flow from unsuccessful appeals.

A. H. F. L.

## [IN THE COURT OF APPEAL.]

RE PORT ARTHUR AND RAINY RIVER PROVINCIAL ELECTION

(No. 3).

PRESTON V. KENNEDY.

C. A.

1906

Nov. 13.

*Parliamentary Elections—Controverted Election—Scrutiny—Ruling of Trial Judge as to Disqualification of Class of Voters—Appeal to Court of Appeal—Jurisdiction—Finality of Voters' Lists.*

Upon proceeding with the scrutiny consequent upon the judgment of the Court of Appeal, 12 O.L.R. 453, Teetzel, J., one of the Judges who tried the petition, made a general ruling to the effect that in cases of objection to votes on the ground that the persons who voted were under the age of twenty-one years or were aliens, although their names were on the voters' lists, he would receive evidence to shew minority or alienage, notwithstanding the provisions of the Voters' Lists Act declaring that upon a scrutiny the voters' lists shall be final and conclusive:—

*Held*, that no appeal lay to the Court of Appeal from such ruling.

*Per* MEREDITH, J.A., dissenting, that an appeal was competent, and should be entertained and allowed and the ruling reversed.

AN appeal by the petitioner in a controverted election petition from a ruling of Teetzel, J., one of the Judges who tried the petition, when proceeding with the scrutiny consequent upon the judgment of the Court of Appeal reported 12 O.L.R. 453, to the effect that in cases of objection to votes on the ground that the persons who voted were under the age of twenty-one years or were aliens, although their names were on the voters' lists, he would receive evidence to shew these facts, notwithstanding the provisions of the Voters' Lists Act declaring that upon a scrutiny the voters' lists shall be final and conclusive.

The appeal came on for hearing before MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A., on the 1st October, 1906.

*I. F. Hellmuth*, K.C. (with him *W. J. Elliott*), for the petitioner, appellant, explained the nature of the ruling appealed against.

Moss, C.J.O.:—Is there an appeal from such a ruling?

*Hellmuth*, in answer to the objection raised by the Court. Section 66 of the Controverted Elections Act and Election Rules 58, 59, 60, apply if this is an interlocutory order. See also Rule 64, and sec. 75 as to the finality of the judgment of the Court of Appeal. As to the meaning of "interlocutory," see *Bouvier's Law Dictionary*,



C. A.  
1906  
—  
RE  
PORT  
ARTHUR  
ELECTION  
(No. 3).

p. 1096, and Con. Rule 259. The Con. Rules apply where not inconsistent.

*H. M. Mowat*, K.C., for the respondent, who was desirous of having the question raised determined, supported the right of appeal.

Moss, C.J.O.:—We will hear the appeal subject to the objection.

*Hellmuth*, on the merits of the appeal. Section 8 of the Ontario Election Act, R.S.O. 1897, ch. 9, provides that, subject to the provisions of the Act, every male person of the full age of twenty-one years, a subject of Her Majesty by birth or naturalization, and not disqualified under this Act, and not otherwise by law prohibited from voting, shall, if duly entered in the list of voters proper to be used, be entitled to vote, etc. By sec. 24 of the Ontario Voters' Lists Act, R.S.O. 1897, ch. 7, every voters' list certified by the county Judge under the Act, shall, upon a scrutiny, be final and conclusive evidence of the right of all persons named therein to vote at any election at which such list was or could have been legally used. The original of this is 41 Vict. ch. 21, sec. 3 (O.). Section 2, sub-sec. 5, of the Voters' Lists Act, R.S.O. 1897, ch. 7, defines "scrutiny" as any scrutiny of the votes polled at an election within the meaning of sec. 76 *et seq.* of the Ontario Controverted Elections Act. Section 24 was enacted with a knowledge of the existing law. The whole of the revised statutes must be read as one Act: *Boston v. Lelièvre* (1870), L.R. 3 P.C. 157, 162. The 41 Vict. ch. 21, sec. 3, appears in the revision of 1887 as ch. 8, sec. 19. The re-enactment accepts the decision in the *South Wentworth* case (1879), H.E.C. 531, given immediately after the passing of the original Act, that under that Act the legality of the votes of aliens and minors could not be inquired into upon a scrutiny. That decision, I submit, has never been departed from. It was followed in the *South Perth* case (1899), 2 Ont. Elec. Cas. 144. The principle, however, was questioned in two cases, which Teetzel, J., relied on in the ruling now in appeal: *In re South Ontario Provincial Election* (1898), 18 C.L.T. Occ. N. 321; *The South Perth* case (1895), 2 Ont. Elec. Cas. 30. Remarks made in those cases were *obiter*, and the *Wentworth* case was not referred to. The English decisions since the Ballot Act of 1872, 35 & 36 Vict. ch. 33, sec. 7, are not applicable, but before 1872 the Act was like ours: see Rogers on Elections, 18th ed., vol. 2, p. 537. See the *New Windsor* case (1835), Knapp

& Ombler 139; *Davis's case* (1835), *ib.* 160; The *Monmouth case* (1835), *ib.* 409, 415; Elliott on Parliamentary Electors (1843), pp. 264, 382; *Stowe v. Jolliffe* (1874), L.R. 9 C.P. 734.

*H. M. Mowat*, K.C., for the respondent. I rely on what is said in the *South Ontario* and *South Perth* cases cited by counsel for the petitioner, if this is a scrutiny. And see the *Hamilton case* (1891), 1 Ont. Elec. Cas. 499. But I submit it is not a scrutiny; it is part of the trial. The scrutiny is before another tribunal. It was formerly the registrar or a barrister; it must now be before a Judge, but not as trial Judge.

*Hellmuth*, in reply, cited the *West York case* (1872), H.E.C. 156, upon the question of the right of appeal.

November 13. Moss, C.J.O.:—This is an appeal by the petitioner from an opinion or ruling given by Teetzel, J., the rota Judge proceeding with the trial of the scrutiny consequent upon the judgment of this Court in the former appeal.

We have not before us any certificate from the learned Judge, and properly so, for there is no provision either in the Controverted Elections Act, or the Rules and Orders of the Court respecting the trial of election petitions, enabling the Judge to make or give a certificate at the present stage of the proceedings. But from the statement of the case by counsel and the opinion of the learned Judge appearing in the appeal case, it is to be gathered that the learned Judge, upon a question addressed to him by counsel, and not upon the facts proved or admitted with regard to any particular case arising under the scrutiny, ruled or expressed the opinion that in cases of objection to votes on the ground that the person who voted was under the age of twenty-one years or an alien, he would receive evidence to shew these facts, notwithstanding the provisions of the Voters' Lists Act declaring that upon a scrutiny the voters' list shall be final and conclusive. From this ruling the petitioner has appealed to this Court, and he is supported by the respondent in urging that the appeal be entertained and dealt with by the Court.

It is probably quite correct to say that such a course would be a great convenience to the parties, and would result, in all probability, in a very considerable saving of expense to one of them. But it must be borne in mind that consent cannot confer jurisdiction.

C. A.

1906

RE  
PORT  
ARTHUR  
ELECTION  
(No. 3).

C A.

1906

RE  
PORT  
ARTHUR  
ELECTION  
(No. 3).

MOSS, C.J.O.

And, unless it is reasonably clear that the jurisdiction to hear the appeal at this stage of the case does exist, we cannot yield to the request. The Court must be careful to see that it does not usurp a jurisdiction it does not possess. The jurisdiction it has is wholly statutory, and only such as is conferred by the statute can be exercised.

A careful consideration of the provisions of the Controverted Elections Act, R.S.O. 1897, ch. 11, leads me to the conclusion that we cannot entertain this appeal at the present stage of the case.

Section 66 provides that any party to an election petition under the Act, who is dissatisfied with the decision of the Judge or Judges on any question of law or fact, and desires to appeal against the same, may within eight days from the day on which the decision was given deposit with the Registrar of the Court the sum of \$100 by way of security for costs; and thereupon the Registrar shall set the matter of the petition down for hearing before the Court at an early day to be appointed by the Court or a Judge thereof. But reference to other sections shews that the "decision" spoken of is one that disposes of the matters in issue on the petition, and in respect of which the Judge or Judges certify the final conclusion arrived at so far as they are concerned.

Thus under sec. 55 the Judge or Judges trying the petition shall determine whether the member whose election or return is complained of, or any and what other person, was duly returned or elected, or whether the election was void, and shall certify in writing such determination to the Speaker, or, if there is no Speaker, to the Clerk of the House, and upon such certificate being given such determination shall be final to all intents and purposes, "subject only to the appeal hereinafter mentioned."

Again, under sec. 56, in case of disagreement between the Judges before whom a case is tried, they shall certify such disagreement, and either party may thereupon bring the matter before the Court of Appeal, which shall, in disposing thereof, have the same jurisdiction in all respects as on an appeal from a decision of such Judges. The Court of Appeal is to deal with the case as, in their opinion, the trial Judges should have done, and the Registrar is to certify to the Speaker or Clerk of the House in the same manner and to the same effect as the trial Judges should have done; or the Court may refer the case back to the trial Judges with such

declarations and directions as it may think fit, and the trial Judges shall then dispose of the case and certify their conclusions to the Speaker or Clerk.

No other sort of appeal from the decision of the trial Judge or Judges is given by the Act. By sec. 65, if it appears to the Court of Appeal that the case raised by the petition can be conveniently stated as a special case, it may direct the same to be stated, and the case shall be heard before the Court, and the Registrar shall certify to the Speaker the determination of the Court. In that case the matter is not dealt with by the trial Judges. The case raised by the petition is put in train for immediate hearing and determination by the Court of Appeal, whose decision ends the matter.

The only other appeal to this Court provided for is under Rules LVIII., LIX., and LX. of the General Rules and Orders respecting the Trial of Election Petitions (23rd December, 1903); but these deal only with matters heard and disposed of in Chambers, and do not apply to any order or decision made or given by a trial Judge in the course of the trial.

It is urged that the subject matter of the appeal in the present case is one which may ultimately be brought before this Court in the form of an appeal from the trial Judge's certificate shewing the final disposition of the case, and that, as we should then have jurisdiction to deal with the question, we ought to assume it now. But we have no right to assume that there will certainly be an appeal upon the final decision. And, even if we could so assume, it would not warrant us in now usurping a jurisdiction which we do not at present possess. The question is, has the petitioner a present right of appeal? It cannot be given to him by inference or by consent or by anything short of statutory enactment. And, in my judgment, there is nothing in the statute enabling him to bring the appeal, or the Court to entertain it, at the present stage of the case.

OSLER, J.A.:—This case was recently before us on an appeal from the decision of the trial Judges dismissing the petition, on the grounds that the charges of corrupt practices had not been made out and that the attack upon the respondent's majority on a scrutiny of the votes had also failed. We affirmed the decision on the first point and overruled it on the second. The case was again taken

C. A.

1906

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 RE  
 PORT  
 ARTHUR  
 ELECTION  
 (No. 3).

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 MOSS, C.J.O.



C. A.  
1906  
RE  
PORT  
ARTHUR  
ELECTION  
(No. 3).  
Osler, J. A.

up before Teetzel, J., one of the trial Judges, and the scrutiny proceeded with so far as to place the respondent in a majority of 15. The petitioner then proposed to attack a number of the respondent's votes as invalid on the ground of the alienage or non-age of the voters, and, without passing upon any individual vote, the learned Judge was asked to rule or to express his opinion whether, as against the votes of persons whose names were on the list of voters as finally revised, these grounds of objection were open to the petitioner. The learned Judge held that they were, and that the voters' list in this respect was not final and conclusive of the right of such persons to vote. The case, therefore, remained to be disposed of so far as such votes were concerned by the application of that ruling to the particular votes, few or many, which might be impeached on the grounds mentioned.

The first question is, whether an appeal from a ruling or decision of this kind made during the course of the trial, which does not dispose of the petition, is competent.

Whether the decision be regarded as an adjudication, which it is not, upon the case of particular votes, or as a mere abstract ruling or opinion, which is its real character, by which the learned trial Judge proposes to guide himself hereafter when the evidence has been adduced, an appeal therefrom, so far as my experience goes, is an entirely novel proceeding, and an experiment for which, with submission, nothing in the Election Act or Rules affords countenance.

It can hardly be necessary to cite authority for the proposition that the right of appeal is matter of jurisdiction not of procedure or practice and that an appeal does not lie unless expressly given by statute. *Attorney-General v. Sillem* (1864), 10 H.L. Cas. 704, (1863), 2 H. & C. 431, *The King v. Hanson* (1821), 4 B. & Ald. 519, 521, and the *Lennox Provincial Election* case (1885), 1 Ont. Elec. Cas. 422, may be referred to. The only appeals given by the Act (I do not speak of appeals from the decision of a Judge in Chambers in interlocutory questions and matters—Rules LVIII. LX.), are appeals from the judgment of the trial Judge or Judges disposing or not agreeing in the disposal of the matter of the petition. Provision is also made for submission to the full Court of a special case, when it appears that the case raised by the petition can be conveniently stated in that way.

It seems necessary briefly to outline the relative sections of the Controverted Elections Act, as amended by 62 Vict. (1) ch. 4 (1898).

Section 38. Every petition shall, except where it contains allegations of corrupt practices, in which case it must be tried by two Judges, and except where it raises a question of law for the determination of the Court (sec. 65), be tried by one of the Judges on the *rota*, sitting in open Court, without a jury.

Section 55. The Judges trying the petition shall determine whether the member whose election is complained of, or any other person, was duly returned or elected, or whether the election was void, and, except in the case of an appeal as herein-after mentioned, shall certify in writing such determination to the Speaker or to the Clerk of the House, and upon such certificate being given such determination shall be final to all intents and purposes.

If an appeal is made to the Court of Appeal the Judges trying the petition "shall make the certificates and reports in the (Controverted Elections) Act mentioned to the Court of Appeal," and the Judges shall not certify their determination of the case to the Speaker until after the security for costs has been deposited or the time for depositing it has expired: 62 Vict. (1) ch. 4, secs. 8, 9.

Section 56. In case of a disagreement between the Judges before whom a case is tried they shall certify such disagreement, and either party may bring the matter before the Court of Appeal, which Court shall in disposing thereof have the same jurisdiction in all respects as on an appeal from a decision of such Judges, and may determine all questions of law or fact which the disagreeing Judges might or should have determined, and in the same manner as, in the opinion of the Court, the disagreeing Judges should have done.

In such case the Registrar of the Court of Appeal is to certify to the Speaker or Clerk of the House the decision of the Court upon the case.

Sub-section (2) enables the Court of Appeal to refer the case back to the trial Judges to certify to the Speaker or Clerk in accordance with their directions.

C. A.  
1906  
RE  
PORT  
ARTHUR  
ELECTION  
(No. 3).  
Osler, J.A.

C. A.  
1906  
RE  
PORT  
ARTHUR  
ELECTION  
(No. 3).  
Osler, J.A.

Section 58 directs how the appeal in case of disagreement shall be brought; what security for costs shall be given, and when; "and the proceedings in the matter shall be the same, as nearly as may be, as in the case of an appeal from a decision of the Judges."

Section 63. If the trial Judges decide that the election or return was void, or that some other person was elected or is entitled to the seat, neither the member returned nor such other person shall sit or vote pending an appeal from the decision : 62 Vict. (1) ch. 4, sec. 11.

Section 64. A writ for a new election shall not be issued until after the expiration of eight days from the decision of the trial Judge or Judges declaring the election or return void, and if the appeal is from the part of the decision which declares the election or return void, the writ shall not issue pending the appeal.

Section 66 and following sections then provide for the appeal from the decision of the Judges referred to in sec. 55.

Section 66. Any party to an election petition who is dissatisfied with the decision of the trial Judges on any question of law or fact, and desires to appeal against the same, may within eight days give the prescribed security for costs, and thereupon the Registrar is to set the matter of the petition down for hearing before the Court.

Section 67. Notice is to be given in the manner prescribed that the matter of the petition has been so set down, and by the notice the appellant may limit the subject of the appeal to any special or defined question or questions.

Section 68. The appeal shall thereupon be heard and disposed of by the Court, and such judgment shall be pronounced, both on questions of law and fact, as in the opinion of the Court should have been delivered by the Judge or Judges whose decision is appealed against.

Section 69. In cases involving questions of fact, the Court shall review the decision upon questions of fact as well as of law, and shall draw such inference from the facts in evidence as the Judge or Judges who tried the case should have drawn.

Section 70 confers power upon the Court to make amendments and admit further evidence on the hearing of the appeal.

Section 71. The Court, with or without a report from the trial Judges as to the demeanour of witnesses, etc., may reverse or confirm the decision appealed against, in view of the whole case

as it then appears, or they may require any witnesses to be re-examined, etc.

Section 73. The Registrar of the Court shall thereupon certify to the Speaker or Clerk of the House the judgment and decision of the Court upon the several questions and matters of fact, as well as of law, upon which the trial Judges might otherwise have determined or certified, and would but for such appeal have been required to report to the Speaker or Clerk, and the judgment or decision shall be final to all intents and purposes : 62 Vict. (1) ch. 4, sec. 12.

Section 74. Instead of certifying as aforesaid, the Court, upon such conditions as it thinks fit, *may grant a new trial* for the purpose of taking evidence or additional evidence, and may remit the case to the Judge or Judges who tried the same, etc.; and, subject to the directions of the Court of Appeal, the case shall be thereafter proceeded with as if there had been no appeal.

Under the scrutiny clauses, as they formerly stood, the scrutiny was conducted before the registrar of the trial Judges or a barrister appointed by them, whose decision was reviewable before the Judges at the trial. As the Act is amended, the scrutiny takes place before the Judge or Judges themselves as part of the trial.

From the provisions I have quoted it is apparent that the only appeal given by the Act is an appeal from the decision of the trial Judges, which disposes of the whole matter of the petition as mentioned in sec. 55, or from a disagreement of the Judges at the trial upon questions which, if they had agreed in deciding them, would have done so, and which decision would have enabled them, in the absence of an appeal, to have certified to the Speaker or Clerk of the House the result of the trial. If there is an appeal, this becomes the duty of the Court of Appeal. If they do not direct a new trial or send the case back to the trial Judges (where they have disagreed) to dispose of the case in accordance with their directions, it is their judgment which becomes the final judgment and which is certified to the Speaker or Clerk instead of that of the trial Judges.

In short, the only judgment which the trial Judges are required to certify is a judgment which disposes of the whole case, and the only appeal given by the Act is one from

C. A.

1906

RE  
PORT  
ARTHUR  
ELECTION  
(No. 3).

Osler, J.A.



C. A.  
1906

RE  
PORT  
ARTHUR  
ELECTION  
(No. 3).

Osler, J.A.

such a judgment or from a disagreement of the trial Judges in respect of matters which if they had agreed would have done so.

I have not overlooked the provisions of sec. 2, sub-sec. (1), of the Controverted Elections Act, which enacts that the Court, which means the Court of Appeal, shall, subject to the provisions of the Act, have the same power, jurisdiction, and authority with reference to an election petition and the proceedings thereon as the High Court of Justice would have if such petition were an ordinary action within the jurisdiction of that Court; and see Controverted Election Rule LXIV.

Whether the Court of Appeal or a Judge thereof could have made an order by applying *ad hoc* the provisions of Con. Rule 373, and directing a special case to be heard before Teetzel, J., or before the Court, raising the question of law which he has decided, is, I think, more than doubtful, seeing that the Controverted Elections Act, in sec. 65, has itself dealt with that method of procedure.

However that may be, it is not the way in which the case came before us. It is an appeal from a ruling of the trial Judge on a single question of law which has been raised before him, the determination of which, as applied to the facts which may afterwards be proved, may have no effect upon the ultimate decision of the case. I do not see how, by any analogy to the conduct of the trial of an ordinary action at law, such a ruling can be appealable. If it is so, and in the line of the procedure which has here been adopted, there may be as many separate appeals as there are different classes of votes to be scrutinized. The inconvenience, delay, and expense which would arise from such a practice need hardly be emphasized, and the fact that it may happen to be quite otherwise in this particular instance will not justify us in sanctioning it. Rules 531, 259, and *Pooley v. Driver* (1876), 5 Ch.D. 458, 468, may be referred to.

GARROW and MACLAREN, JJ.A., concurred.

MEREDITH, J.A.:—The only questions raised upon this appeal are whether, upon a scrutiny of votes, under sec. 76 of the Controverted Elections Act, the Judge can try and determine whether voters were of full age, and whether they were British subjects. The Judge has, upon a scrutiny in this case, answered these questions

in the affirmative, and both parties are desirous that this appeal against such decision should be heard and determined before any proceedings consequent upon it are taken in the scrutiny, but it has been suggested by some of the members of this Court that such an appeal does not now lie, that it cannot be brought until the scrutiny is ended and judgment is given finally disposing of the whole case. It is in the public interests, as well as in the interests of all persons more directly concerned, including a number of witnesses, that these questions be now finally determined, for, obviously, it would be a fruitless waste of time, energy, and money, as well as the cause of much inconvenience, if the scrutiny were to go on and if it were eventually determined that such questions are not now open to the parties, that the decision in question was wrong. But convenience will not confer jurisdiction; and the appeal ought not to be entertained, without jurisdiction.

There is, however, in my opinion, no doubt of the jurisdiction, nor that it ought to be exercised in this case now, the appeal having been fully argued subject to the objection.

Section 66 of the Controverted Elections Act gives a right of appeal from "the decision of the Judge or Judges on any question of law or of fact," without a restriction as to the time or character of the decision; and there is nothing in any other section which takes away that right. The provisions of sec. 73 do not necessarily limit it, for, in the first place, there is no reason why the judgment upon this appeal may not be certified to the Speaker or the Clerk of the House; and there would be nothing extraordinary in the legislature, when transferring the trial of controverted election cases from the House to the Courts, providing for official reports of all the decisions in such cases; and, in the next place, if the section refer to a report determining the right to the seat only, then a report cannot be required in every case, but only in cases in which the judgment has that effect. That there may be cases in which the judgment has not such effect is obvious, and is exemplified, for an instance, by the former appeal in this case, resulting in a decision that the trial should be continued only, and in respect of which no report was made from this Court or from the trial Judges. Section 66 alone confers all rights of appeal given by the Act, and must cover all kinds of appeals under the Act, and so cannot

C. A.

1906

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RE  
PORT  
ARTHUR  
ELECTION  
(No. 3).

---

Meredith J.A.

C. A.  
1906

RE  
PORT  
ARTHUR  
ELECTION  
(No. 3).

Meredith, J. A.

be limited to appeals directly determining the right to the seat in question.

Really the whole matter is merely one of procedure, and, unless legislation, or Rules of Court, or the settled practice, prevent it, the Court has power to and must regulate the practice as occasion requires. Ordinarily the prosecution of appeals by piecemeal would be inexcusable and should not be permitted; but this is a case of a character such as sometimes arises on references, justifying an intermediate appeal to settle the principles upon which the reference ought to proceed. There being then a right of appeal clearly given by sec. 66, and not expressly or by necessary implication taken away by any other provision of the Act or by any Rule of Court, and the case being one in which the interests of all concerned require that the appeal be heard and determined before any further proceedings in the scrutiny are taken, and the appeal having been fully argued, and there being no established practice to the contrary, but it being rather in accord with the practice provided for under Rule LXIV., the appeal ought now to be determined. In short an appeal unquestionably lies, and the question whether it should be considered now or at a later stage of the case is purely one of procedure merely.

By now entertaining this appeal, no encouragement is given to unnecessary or untimely appeals, such as those suggested during the argument; the general rule that an appeal is not to be taken until the whole matter is finally dealt with is not unduly encroached upon; the case is an exceptional one, the scrutiny is very like a reference. The Rules of Court and the practice by analogy, and the inherent power of the Court over its own procedure, provide ample safeguards against any abuse of the right to appeal conferred by the Act.

On the merits of the appeal, I am of opinion (1) that the learned Judge ought to have followed the decided cases, and (2) that such cases were rightly decided.

Soon after the passing of the enactment in question—sec. 24—embodied in the Voters' Lists Finality Act, the very question arose and was plainly decided against the right to consider the question of age or allegiance upon a scrutiny.\* At that time the reasons for, and the purposes of, the enactment were generally better known

\* See the *South Wentworth* case, H.E.C. 531.

than they seem to be now. Every one was familiar with the details of long drawn out, if not quite interminable, inquiries upon scrutinies, and every one acknowledged the urgent need of greater finality regarding the voters' lists, so as to curtail them; and so the Act was passed. Many years afterwards the same question was raised and was decided in the same way† and for the same reasons, though the earlier case was not brought to the notice of the Court; and no decision of any character to the contrary has been brought to our notice, and I am aware of none; so that it may safely be said that the law has ever since the passing of the Act been interpreted contrary to the decision in question.

That these cases were rightly decided, yet seems to me to be quite clear. There is no conflict between the two enactments. Neither infant nor alien has a right to vote, that is the effect of the Election Act, but the question whether one is or is not an infant or alien must be raised and determined in the manner provided for in the Voters' Lists Act; and whether so raised and determined or not cannot be considered on a scrutiny under the Controverted Elections Act, for the lists are there to be "final and conclusive evidence of the right of all persons named to vote . . ." The decision in question wholly disregards this enactment, and, if affirmed, would practically repeal it.

No useful purpose would be served by an inquiry into the circumstances under which the observations\* relied upon by the respondents were made, for no such question as that which we have now to deal with was before the learned Judges when they were made; and it does not appear that the provision of the Voters' Lists Act was brought to their notice or was before their minds at the time. Nor do the observations of Osler, J.A., necessarily conflict with the decided cases before referred to. It may well be that neither infant nor alien has a good vote, but upon a scrutiny, and upon a scrutiny only, that question is concluded by the voters' list. The observations of Burton, J.A., go further; go to the extent of an expression of his opinion that the votes of aliens would be struck off on a scrutiny; to that extent they are, in my opinion, incorrect. Those observations were made during the trial of an election petition at the town of Mitchell, and were preceded by a

C A.  
1906  
RE  
PORT  
ARTHUR  
ELECTION  
(No. 3).

Meredith, J.A.

† See the *South Perth* case, 2 Ont. Elec. Cas. 144.

\* See the *South Perth* case, 2 Ont. Elec. Cas. 30.



C. A.

1906

RE  
PORT  
ARTHUR  
ELECTION  
(No. 3).

Meredith, J. A.

reference to the want of "leisure and opportunity to consult the authorities," and were wholly unnecessary for the decision of the question then being considered.

The other case which was relied upon by the respondent, and which is not reported,† seems to have been a decision at Chambers, that an infant was not a competent petitioner in an election case, a question quite different from that arising on this appeal, and one as to which it is not necessary to express any opinion. That case seems to have gone to this Court, upon an appeal from an order allowing the substitution of another petitioner for the infant, and the appeal appears to have been dismissed. It is obvious that even the question whether an infant was a competent petitioner could not properly have been considered upon that appeal, for the order dealing with that question was not appealed against, and consequently was binding upon both parties.

It is not without significance that the law as laid down in the year 1879, and followed ever since, has not been interfered with by legislation, though the Acts have been re-enacted and amendments to them have been so frequent, including one of the very section itself enlarging instead of curtailing its effect.

Mr. Mowat's argument was, very fairly, and almost necessarily as it seemed to me, reduced to the contention that the inquiry before the learned Judge is not a scrutiny within the meaning of that word as used in the section in question, his point being that a scrutiny before a Judge's registrar or barrister only was meant, and that, as an amendment to the Controverted Elections Act had repealed the provisions of that Act, giving power to a Judge to appoint his registrar or a competent barrister to act in his stead upon a scrutiny, and giving power to such registrar or barrister so to act, there is now no such thing as a scrutiny, and consequently the section in question has no effect, but is quite a dead letter. But there is no good ground for any such contention. There never was but one scrutiny provided for in secs. 76 to 85 of the Controverted Elections Act; and that one scrutiny might have been had before the Judge himself, or before his delegate in his stead, subject, however, to an appeal to him. By the enactment, 62 Vict., sess. 1, ch. 4, sec. 14 (O.), the power to so appoint another to act in his stead and all the provisions respecting the scrutiny in such a case

† See *In re South Ontario Provincial Election*, 18 C.L.T. Occ. N. 321.

were repealed, leaving only the other mode of conducting the scrutiny open, namely, before the Judge himself, the only mode in which the scrutiny can now be had. The enactment stands, therefore, just as it was, with the power to delegate part of the work only eliminated. The sections remaining are headed by the word "scrutiny," and proceed to provide for the entering into "a scrutiny of the votes polled," by the Judge, and for the mode of conducting the scrutiny.

By interpretation clauses in the Voters' Lists Act, it is expressly declared that a "scrutiny" shall mean "any scrutiny" of votes within the meaning of sec. 76, and the next following nine sections of the Controverted Elections Act, so that there can be no possible misunderstanding as to the meaning of the word "scrutiny" in the 24th section of the former Act, though now, by reason of the amendment before mentioned, the interpretation clause is limited in effect to sec. 76, and the next two following sections, and the verbal change thus rendered necessary will, no doubt, be made in the next revision or re-enactment of the Act.

It would be somewhat extraordinary if there were no such provisions as those contained in the section in question; if such questions as those which the learned Judge considered open upon the scrutiny could be there re-tried after, it might be, having been heard and determined by the county Judge, and possibly by this Court, under the provisions of the Act in which it is contained.

I would allow the appeal.

The Court having now reached the conclusion that this appeal should be dismissed, on the ground of want of jurisdiction to entertain it, it becomes necessary that I should state, as concisely as possible, why I am unable to withdraw the foregoing opinion on either of the grounds dealt with in it.

It should go without saying that no appeal lies to this Court unless conferred by legislative enactment, or Rules of Court authorized by such enactment. But I would have thought it equally clear under sec. 66 of the Act—R.S.O. 1897, ch. 11—that a right of appeal in such a case as this is expressly given.

"Any party to an election petition under this Act who is dissatisfied with *the decision of the Judge or Judges on any question of law or of fact*, and desires to appeal against the same, may within eight days from the day on which the decision was given deposit

C. A.

1906

RE

PORT

ARTHUR

ELECTION  
(No. 3).

Meredith, J.A.

C. A.

1906

RE  
PORT  
ARTHUR  
ELECTION  
(No. 3).

Meredith, J. A.

with the Registrar of the Court the sum of \$100 by way of security for costs; and thereupon the Registrar shall set the matter of the petition down for hearing before the Court at an early day to be appointed by the Court, or a Judge thereof." The question involved in this appeal is a question of law, and it has been decided by the Judge of the scrutiny, and the appellant is dissatisfied with that decision. It is a decision of far-reaching effect. What more is wanted? It is obviously well within the broad words of the section. Surely the words referring to the setting down of "the matter of the petition" cannot affect the question. The Court is not to try the whole petition; it is to determine the question or questions raised in the appeal; there may be an hundred others which have been decided, with which neither party finds fault. But what then is the registrar to set down? The only cause in Court is "in the matter of the petition," etc., and it is that matter which is to be set down upon the Court's list of cases for argument. It would be extraordinary if these words nullified the foregoing ones giving a right to appeal from the decision on any question of law or fact. They relate to the mere matter of setting down the appeal for prompt hearing and refer only to the style of the cause. But if any other section limits the general right of appeal, it must of course be so limited; the limitation, however, ought to appear with reasonable clearness. Sections which deal with appeals of a certain character and make provisions as to them cannot preclude or limit appeals of a different character. I am yet quite unable to find anything in any other sections directly or indirectly precluding an appeal in such a case as this.

An appeal being given by the enactment, the time and manner in which it shall be heard is surely but matter of procedure, in the power of the Court to regulate, unless enactment or Rules of Court provide otherwise.

It would be an extraordinary thing if the Legislature had not made provision for an appeal in such a case as this; if nothing could be done to prevent a scrutiny, such, for instance, as one of the old fashioned Lincoln or Haldimand kind, until—if I may use an "Hibernianism"—the scrutiny and its attendant inquiry was over. Suppose the question to be whether the Judge could at all properly hold the scrutiny, must the parties wait until it is all over—even if

it take a year—before it could be determined in appeal that he had no power to hold it at all?

Though I might be unable to agree in the judgment of the Court dismissing the appeal, on this ground, if I could reach the conclusion that the appeal failed upon its merits, I should be able to agree in that judgment, but upon the other ground; it is therefore necessary that I should consider the appeal upon the merits, and in that respect my opinion before written remains unaltered. I would therefore allow the appeal.

E. B. B.

C. A.

1906

RE  
PORT  
ARTHUR  
ELECTION  
(No. 3).

Meredith, J.A.



## [DIVISIONAL COURT.]

D. C.

1906

Sept. 28.

Oct. 11.

THE LONDON AND WESTERN TRUSTS CO. v. LOSCOMBE ET AL.

*Third Parties—Company—Payment of Dividends Out of Capital—Action by Liquidator Against Directors—Claim of Relief Over Against Shareholders—Joinder of as Third Parties—Rule 209—Scope of*

In an action by the liquidator of an insolvent company against the directors, specifying several alleged illegal acts, amongst which was that of payment of dividends out of capital, the Master in Chambers, at the instance of two of the defendants, who claimed indemnity over against the shareholders for any amounts so paid, issued the usual third-party order, under Con. Rule 209, directing that two out of a large number of shareholders should be joined as third-party defendants, as a test case, but no order for their representing the class was obtained, though it was stated that if they appeared such order would be applied for. On appeal by the plaintiff and the third parties, to a Judge in Chambers, the order was set aside. An appeal therefrom by the defendants to a Divisional Court was dismissed, the plaintiff undertaking that any moneys realized in the action would not be distributed without notice to the defendants and without leave therefor being obtained from the local Judge.

THIS was an appeal by the third parties and the plaintiffs from an order of the Master in Chambers giving directions as to the trial of the third party issues.

The motion for the trial of the issue was heard before the Master in Chambers on September 26th, 1906.

*W. E. Middleton*, for the defendants.

*F. Aylesworth*, for the third parties.

*G. S. Gibbons*, for the plaintiffs.

September 28. THE MASTER IN CHAMBERS:—The action is brought by the liquidator of the Birbeck Loan Company, claiming that the defendants, who were directors of the insolvent company, improperly paid dividends out of capital, and to compel them to refund such amounts so improperly paid.

Two of the defendants obtained the usual third party order. They claim to be indemnified by the shareholders for any such money paid to shareholders, and two of them have been made third parties, as test cases.

It was contended by the third parties and the plaintiffs that the order should be discharged. It was not denied that there were 126 shareholders on the date of the winding-up order, and that during the last six years there have been 48 transfers of shares.

The following cases were cited: *Wye Valley R.W. Co. v. Hawes* (1880), 16 Ch.D. 489; *Flitcrofts Case* (1882), 21 Ch.D. 520; *Moxham v. Grant*, [1900] 1 Q.B. 88; *Davey v. Cory*, [1901] A. C. 477; *Towers v. African Sun Co.*, [1904] 1 Ch. 558.

These cases seem to shew that there is authority to issue the third party notice; that such an order should not be made as "will hinder or embarrass the plaintiff in the prosecution of the action"; that if the shareholders, or any of them, had knowledge of the facts alleged against the defendants, they would be liable to indemnify the directors.

The course taken by the defendants here seems to avoid the ground on which the third party notice was refused in the *Wye Valley R.W.* case.

If it is the fact that all the shareholders are in the same position as the two now brought in, then it is not improbable that so many of the others as are solvent will abide by the result of the present procedure. In this way there will perhaps be effected a consolidation of 180 possible actions before they have begun (if such an expression may be allowed). This will certainly be so if the defendants succeed in obtaining an order for representation of the other shareholders by the two now brought in.

At present I think the usual order should issue for the trial of the third party issues.

I do not see that the third parties can complain, as *Moxham v. Grant*, supra, shews that the liquidator might have sued every one who had received part of these dividends if it had been thought best to do so, instead of attacking the directors.

From this order of the Master the third parties appealed to a Judge in Chambers.

On October 10th, 1906, the appeal was heard before MABEE, J., sitting in Chambers. The facts are fully set out in the judgment.

*C. A. Moss*, for third parties.

*G. S. Gibbons*, for the plaintiffs.

*W. E. Middleton*, for the defendants Wortman and Durand.

October 11. MABEE, J.:—The plaintiffs are the liquidators of the Birbeck Loan Co.; the defendants were, with several others, directors of that company.

D. C.  
1906  
LONDON  
AND  
WESTERN  
TRUSTS  
Co.  
v.  
LOScombe.

D.C.  
1906  
LONDON  
AND  
WESTERN  
TRUSTS  
CO.  
v.  
LOSCOMBE.  
Mabee, J.

The statement of claim sets forth the following alleged causes of action against the defendants: (1) that during several years, although the expenses and losses exceeded the profits earned, the defendants "declared and paid dividends upon all the various classes of stock" in the Birbeck Co., and that such payments were illegal and unauthorized; (2) that the defendants made several illegal and improper loans, which are fully specified; (3) illegally surrendered certain mortgages; (4) illegally allowed one of the defendants to withdraw from the company \$2,348.74; (5) illegally applied and appropriated \$350 towards the expense of forming a bank; and it is said these illegal acts have depleted the capital stock of the company to the extent of \$70,000.

The defendants Wortman and Durand set up various defences, making general denials, alleging good faith, proper audits, etc.; and also alleging that the plaintiffs, who represent the shareholders, are not entitled to maintain an action to recover moneys alleged to have been improperly paid to such shareholders; that the shareholders who received the dividends are practically the same persons who are shareholders at this time; that directions will be asked for an enquiry, and that the moneys, if any, improperly paid, be refunded or set off.

The material shews that at the date of the winding-up order there were 126 permanent shareholders, and that during the last six years the changes in the ownership of permanent shares have numbered 48. I presume this means transfers.

The defendant Wortman, upon an affidavit alleging that he desired to obtain relief over against the shareholders with respect to moneys paid to them individually; that Moorehouse and Watson are two shareholders, and that he (Wortman) desired to obtain relief over against them to the extent of the moneys paid to them, procured a third party notice, and served the same upon Moorehouse and Watson.

The defendant also states that if these third parties appeared he (Wortman) proposed to apply for an order directing them to represent the class of shareholders.

The learned Master, upon the application of the defendants, made the usual order for trial of the third party issue, and from this both the third parties and the plaintiffs appeal.

The learned Master thought the course pursued might effect a consolidation of 180 possible actions, but of course this could not be so unless, as he states, the defendants succeeded in obtaining an order for representation of the other shareholders by the two sought to be brought in. No such order has been applied for, and I do not think any such order could be made, so as matters stand, if the third party issues are tried as ordered it will dispose only of the liability of two shareholders and leave 178 claims to be disposed of in some other way.

It will be observed that the claim for indemnity applies only to one of the five separate and distinct causes of action alleged in the statement of claim.

I do not think this is the sort of case intended to be covered, or that it is covered, by Rule 209. The right of the defendants to recover from the various shareholders the dividends paid to them, if any such right exists, does not arise by virtue of a recovery by the plaintiffs from the defendants of these same moneys, and unless the right against the shareholders accrues to the defendants by reason of a recovery at the instance of the plaintiffs, it cannot be an *indemnity*. If the defendants have any right to recover from the shareholders, they could at any time have taken proceedings against them for the moneys erroneously paid, and if they could not recover upon their own initiative I do not think their position would be in any way strengthened because the plaintiffs recovered from them.

It is not suggested that this is a case of "contribution."

It remains, then, to consider if it falls within the words "any other relief over."

I think this also should be limited or confined to the class of cases in which the relief over arises by reason of the defendant being held liable to the plaintiff, and that is not this case. There may be cases where the right is not strictly one of indemnity, but which right has its existence solely because the defendant has been adjudged liable, and the words in question are, I think, intended to apply in such cases only.

It is said one object of the rule is to prevent the same question arising between the plaintiff and defendant, and the latter and the third party, being tried in different forums and the possible scandal of different conclusions being arrived at.

D. C.

1906

LONDON  
AND  
WESTERN  
TRUSTS  
Co.  
v.

LOSCOMBE.

Mabee, J.



D. C.  
1906  
LONDON  
AND  
WESTERN  
TRUSTS  
Co.  
v.  
LOSCOMBE.  
Mabee, J.

The "*same question*" is not involved in this case. These defendants may be liable to the plaintiffs and still not be entitled to recover from the shareholders the dividends paid to them. These issues are entirely separate and distinct, and present different considerations and the evidence will be different.

Other difficulties present themselves by reason of the fact that three only out of many directors are sued in this action. The moneys are said to have been paid, or certainly could only have been paid, by a resolution or by-law of the board of directors, and it is by no means clear that these individual defendants could enforce rights over against the shareholders, if any such rights exist, without the presence, as parties to the proceedings, of their fellow directors. Again, if the defendants, or the board as a body, could recover these dividends back from the shareholders, it must be by reason of separate and distinct causes of action against each individual shareholder. I do not think all the shareholders could be joined in one action, and it does not seem proper to permit, by means of this uncertain third party procedure, what could not be done in an ordinary action, namely, a consolidation of many distinct causes of action against different individuals.

It was stated that there are no creditors of the Birbeck Co.; that the action was brought in the supposed interest, and for the benefit of the shareholders, and that if moneys were recovered from the directors the only persons entitled would be practically the same body of shareholders to whom the dividends in question had already been paid. The defendants in their defence claim relief as to this feature of the case. Inasmuch as this action is being proceeded with by the liquidators, only with the sanction of the Court, there is complete power in the Court to see that no hardship results to the directors in respect to the dividends in dispute, and if it appears that the only persons who would be entitled to receive them, or part of the depleted capital of the company, if they are recovered from the defendants, are the same persons to whom these moneys have already been paid, the Court may direct that portion of the liquidators' claim in the action to be abandoned, so no real necessity exists for any endeavour to stretch the scope of the third party rule.

No hardship will result from allowing this appeal; and it is allowed; the order of the Master will be vacated, and the service

of the third party notice set aside. The defendants must pay the costs of the plaintiffs and the third parties before the Master and of this appeal.

Reference may be had to the following cases: *Parent v. Cook* (1901), 2 O.L.R. 709, 712, (1902), 3 O.L.R. 350; *Wynne v. Tempest*, [1897] 1 Ch. 110; *Moore v. Death* (1884), 16 P.R. 296; *Catton v. Bennett* (1884), 26 Ch.D. 161; *Wye Valley R.W. Co. v. Hawes*, 16 Ch.D. 489; *Moxam v. Grant*, [1900] 1 Q.B. 88; *Davey v. Cory*, [1901] A.C. 477; *Miller v. Sarnia Gas and Electric Co.* (1900), 2 O.L.R. 546; and *Holmsted & Langton's Practice*, p. 392, and additional cases there referred to.

The defendants Wortman and Durand appealed from the above order to the Divisional Court, and the motion came on for argument before MEREDITH, C.J.C.P., MACMAHON and ANGLIN, JJ., on the 30th day of October, 1906.

The same counsel appeared.

The Court, after the motion had been partially argued, dismissed the appeal with costs to be paid to the proposed third parties by the appellants, upon the undertaking of the plaintiffs not to distribute the fund they might recover in this action without notice to the appellants, and on leave being obtained therefor of the senior Judge of the county of Middlesex.

G. F. H.

D.C.  
1906  
LONDON  
AND  
WESTERN  
TRUSTS  
CO.  
v.  
LOSCOMBE.  
Mabee, J.

## [DIVISIONAL COURT.]

D. C.

1906

Nov. 7.

SCHAEFFER V. ARMSTRONG.

*Costs—District Court—R.S.O. 1897, ch. 109, sec. 11—Action Beyond Jurisdiction of County Court—Discretion of District Judge as to Scale of Costs—Rules of Court—Application of.*

Where, in an action tried before a district court Judge, without a jury, there is a recovery for an amount beyond the jurisdiction of the county courts the Judge is not compelled, under sec. 11 of the District Courts Act, R.S.O. 1897, ch. 109, read in the light of the Rules of Court applicable thereto, either to withhold costs altogether or to grant a certificate therefor on the High Court scale. He has a discretionary power, and may certify for costs on the county court scale only.

THIS was an appeal from the judgment of the Judge of the district court of the district of Manitoulin in certifying that the plaintiff was entitled to county court costs only.

The action was brought by the plaintiff for replevin and the conversion of a quantity of logs cut by him on the defendant's land, and was tried by the judge without a jury.

The district Judge found for the plaintiff with \$258 damages, but directed that he should only have costs on the county court scale. From that part of the judgment certifying as to the costs the plaintiff appealed.

On November 6th, 1906, the appeal was heard before BOYD, C., MAGEE and MABEE, JJ.

*J. E. Jones*, for the appellant. The Judge found for the plaintiff for \$258, and by his certificate he held that he was entitled to the costs, but he limited the costs to the county court scale. Section 11 \* of R.S.O. 1897, ch. 109, expressly provides that where the

\* 11 (1). Where the amount claimed in any action in the said district courts of the provisional judicial districts of Algoma and Manitoulin and of Thunder Bay and Rainy River, or where in the case of an action for the recovery of land or in replevin the subject matter of the action, as appearing in the writ in the action or in the affidavit filed to obtain the order in replevin, is beyond the jurisdiction of the county courts in other parts of Ontario, costs to a successful defendant shall be taxed according to the High Court tariff.

(2). In like manner where the plaintiff recovers in respect of a cause of action beyond the jurisdiction of the county courts, costs shall be taxed to him according to the High Court tariff, subject, however, to his obtaining the certificate or order of the Judge where in a like case such certificate or order is required in the High Court.

D. C.

1906

SCHAEFFER

v.

ARMSTRONG.

amount recovered would be beyond the jurisdiction of a county court, the plaintiff is entitled to High Court costs, subject to his obtaining a certificate of a Judge therefor. The Judge, if he thinks he is not entitled to costs, may withhold his certificate altogether; but if he thinks he is entitled to costs he must grant the certificate to entitle the plaintiff to costs on the High Court scale. Con. Rule 1130, which provides that subject to the express provisions of any statute the Judge or Court shall have full power to determine by whom and to what extent costs shall be paid, must be read as subject to sec. 11.

*A. J. Thomson*, for the respondent. This being an action tried without a jury, the certificate of the learned Judge was necessary to entitle the plaintiff to costs. If therefore the certificate was defective the plaintiff is not entitled to any costs. The Judge, however, was acting within his jurisdiction in certifying for costs on the county court scale. Section 11 must be read in connection with sub-sec. 3 of sec. 9. The same practice is to prevail as in the High Court, and Con. Rule 1130 applies: *Holmested & Langton's Judicature Prac.*, 3rd ed., p. 1368, and the case of *Palmer v. Palmer* there referred to.

November 7. *BOYD, C.*:—By the Interpretation Rule county court includes district court: Con. Rule 6 (*b*).

By Rule 1216 all the rules as to practice and procedure in actions in the High Court are made to apply to county court actions.

By Rule 1130 the Court or Judge has unlimited discretion as to the award of costs, subject to the provisions of the Judicature Act and to the express provisions of any other statute.

By Rule 1137 a lump sum may be awarded for costs by the Court, and this means that costs may be given on the county court scale, even where the action is beyond the county court jurisdiction. See *Palmer v. Palmer*, cited in *Holmested & Langton*, 3rd ed., p. 1368.

By sec. 72 of the Judicature Act, no appeal lies in respect of an order as to costs which are by law left to the discretion of the Court. Nor is there any express provision in the Unorganized Territories Act, R.S.O. 1897, ch. 109, in contravention of this result. The district Judge has power over costs, whether in a jury or non-jury case. In a jury case costs follow the result unless the



D. C.  
1906  
SCHAEFFER  
v.  
ARMSTRONG.  
Boyd, C.

Judge otherwise orders. In a case tried by himself he has to give costs before any can be taxed. In this case, disposed of without a jury, no costs could be taxed to the plaintiff without the direction of the Judge. His order is to tax on the county court scale.

I do not think sec. 11 of the Act (ch. 109) is to be read so as to give no alternative between withholding costs altogether and having them taxed on the High Court scale. I read this section as if thus expressed: as to costs in actions beyond the jurisdiction of county courts, costs awarded to a successful defendant shall be taxed according to the High Court tariff, unless the Court otherwise orders, and costs awarded to a successful plaintiff shall be taxed according to the High Court tariff unless the Court otherwise orders. There is no express declaration negating such a manner of awarding costs in the district court, and I think the plain provisions of the Rules which have the force of statutory clauses control the general enactments in ch. 109.

This decision approves a uniform method of dealing with costs in all the series of courts of record.

The appeal is dismissed, but as the point is a new one, and fairly arguable, no costs will be given.

MAGEE and MABEE, JJ., concurred.

G. F. H.

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## [DIVISIONAL COURT.]

REX v. SPELLMAN.

D. C.

1906

Nov. 30.

*Police Magistrate—Jurisdiction in City and County—Subsequent Appointment of Salaried Police Magistrate for the County—Offence Committed in County Outside the City Limits—Jurisdiction.*

Motion to quash a conviction made by a police magistrate of a city, appointed under R.S.O. 1877, ch. 72, and afterwards appointed police magistrate for the county in which the city was situate, under 41 Vict. ch. 4, sec. 9 (O.), for an offence committed in the county outside the city limits. A salaried police magistrate was subsequently appointed for the county under 48 Vict. ch. 17, sec. 1 (O.); R.S.O. 1887, ch. 72, sec. 8.

*Held*, that the conviction was good, as the later appointment was not "in the place and stead" of the first, and that the convicting magistrate had jurisdiction in both city and county.

*Per* BRITTON, J.:—The city police magistrate is *ex officio* a justice of the peace for the county, and could, as police magistrate, sitting alone, do anything that two justices of the peace sitting together could do.

THIS was a motion to quash a conviction for selling liquor without a license, which was argued in the first instance as if on the return of a rule *nisi* with the consent of the Deputy Attorney-General, who appeared in support of the conviction, and by the permission of the Court.

The offence was committed in the village of Lakefield within the county of Peterborough, but outside the limits of the city of Peterborough.

It appeared that the convicting police magistrate, Mr. D. W. Dumble, had on the 25th of November, 1882, been appointed police magistrate for the town of Peterborough under R.S.O. 1877, ch. 72; and that the town was afterward incorporated as the city of Peterborough: Mr. Dumble held the office of police magistrate of the city, and on the 22nd of April, 1886, was appointed police magistrate for the county of Peterborough under 41 Vict. ch. 4, sec. 9 (O.); that Mr. George Edmison was afterwards, on the 30th of July, 1889, appointed a salaried police magistrate for the county of Peterborough under 48 Vict. ch. 17, sec. 1 (O.), and R.S.O. 1887, ch. 72, sec. 8; and that when Mr. Dumble heard the evidence and made the conviction against the defendant he was not acting because of the illness or absence, or at the request of Mr. Edmison.

D.C.

1906REX

v.

SPELLMAN.

The motion was argued on the 26th of October, 1906, before a Divisional Court composed of FALCONBRIDGE, C.J.K.B., BRITTON, and MABEE, JJ.

*Haverson*, K.C., for the motion, contended that the appointment of Mr. Edmison as police magistrate for the county superseded the appointment of Mr. Dumble as police magistrate for the county, and that the latter had no jurisdiction to hear the complaint and try the offence committed outside of the city of Peterborough unless because of the illness or absence or at the request of Mr. Edmison, and cited *Rex v. Miller* (1906), tried before Anglin, J. (not reported); *Robertson v. Freeman* (1863), 22 U.C.R. 298; *Smyth v. Latham* (1833), 9 Bing. 692, at p. 710.

*John R. Cartwright*, K.C., shewed cause, and contended that the later appointment not being made "in the place and stead" of the former, did not interfere with or affect in any way the jurisdiction of the one first appointed, and that Mr. Dumble, being *ex officio* a justice of the peace for the county, as police magistrate could, sitting alone, do everything that two justices of the peace could do in the county, and cited *Hunt qui tam v. Shaver* (1895), 22 A.R. 202.

November 30. FALCONBRIDGE, C.J.:—The power to appoint a police magistrate under 41 Vict. ch. 4, sec. 9 (R.S.O. 1897, ch. 87, sec. 18), lies with the Lieutenant-Governor-in-Council; but the appointment under R.S.O. 1887, ch. 72, sec. 8 (now R.S.O. 1897, ch. 87, sec. 15), is to be made by the Lieutenant-Governor.

The Interpretation Act, R.S.O. 1887 & 1897, ch. 1, secs. 6 & 7, defines what is meant by the words "Lieutenant-Governor" and "Lieutenant-Governor-in-Council."

In *Smyth v. Latham*, 9 Bing. 692, the appointing power was the same, viz., the Commissioners or the Treasury, and it appears (p. 710) that the new officer was appointed "in the place and stead" of the old one.

In *Robertson v. Freeman*, 22 U.C.R. 298, the appointing power was the same, and there could, of course, be but one county attorney for the county.

The appointment therefore of Mr. Edmison is not a revocation of that of Mr. Dumble.

And *Hunt qui tam v. Shaver*, 22 A.R. 202, declares that when Mr. Dumble acts, he acts not strictly as a justice of the peace, but as a police magistrate.

I think that Mr. Dumble had jurisdiction, and that the conviction ought to be affirmed, without costs.

D. C.  
1906  
—  
REX  
v.  
SPELLMAN.  
—  
Britton, J.

BRITTON, J.:—On the 31st August, 1906, at the city of Peterborough, the defendant Spellman was convicted by Mr. D. W. Dumble as police magistrate for the city of Peterborough and for the county of Peterborough of selling intoxicating liquor at Lakefield, in said county, without having the license to sell. Spellman was fined \$100.

The objection strongly pressed by counsel for defendant was that Mr. Dumble had no jurisdiction to try the accused for the offence, because (a) he is not police magistrate for the county, and (b) that as police magistrate for the city he had no jurisdiction to try an offence committed in the county outside of the city, there being a police magistrate for the county and in this instance, Mr. Dumble was not acting because of the illness or absence or at the request of that county police magistrate.

Mr. Dumble was appointed a police magistrate for the then town of Peterborough on the 25th November, 1882. He still holds the office for the city of Peterborough—that is conceded. His appointment as police magistrate for the town was authorized by ch. 72, R.S.O. 1877. 41 Vict. ch. 4, sec. 9 (1878), authorized the appointment of a police magistrate for a county, etc., and on the 22nd April, 1886, Mr. Dumble was appointed a police magistrate for the county of Peterborough.

This sec. 9 was carried into the R.S.O. 1887, as sec. 9 of ch. 72.

In 1885, by ch. 17, sec. 1, 48 Vict. (O.), provision was made for the appointment of a salaried police magistrate for the county after the passing of a resolution by the county council affirming the expediency of such appointment. This authority is continued by R.S.O. 1887, ch. 72, sec. 8, and by R.S.O. 1897, ch. 87, sec. 15.

Mr. George Edmison was appointed a police magistrate for the county of Peterborough on the 30th July, 1889, ch. 72, sec. 8, R.S.O. 1887.

I agree with the learned Chief Justice that the appointment of Mr. George Edmison cannot under the circumstances be considered



D.C.  
1906  
—  
REX  
v.  
SPELLMAN.  
—  
Britton, J.

to be in any way "in the place and stead" of Mr. Dumble, and so Mr. Dumble's appointment for the county is not revoked.

But further, I agree with the argument for the Crown that Mr. Dumble as police magistrate for the city acting as he did, and adjudicating in the present case, was within his jurisdiction.

The powers given to the police magistrate for a town or city R.S.O. 1877, ch. 72, secs. 4 & 7, are continued by R.S.O. 1897, ch. 87, secs. 27 & 30.

By sec. 27 Mr. Dumble is *ex officio* a justice of the peace for the whole county of Peterborough.

By sec. 30, sitting as a police magistrate he has power to do alone whatever is authorized by any statute in force in Ontario, within the legislative authority of the Province to be done by two or more justices of the peace—and he has that power while acting anywhere within the county for which he is *ex officio* a justice of the peace.

My opinion is confirmed by sec. 35: "No police magistrate need act in any case arising outside of the limits of the city, town or place for which he is police magistrate unless he sees fit to do so."

The inference is that a police magistrate for the town or city has jurisdiction in the county and outside of what may be called his limits if he chooses to exercise it, although he is not bound to do so. Section 17 does not, I think, restrict the action of a police magistrate. Section 20 is restrictive, but only to police magistrates appointed for county or district or part of a county or district. *Hunt v. Shaver*, 22 A.R. 202, emphasizes the distinction created by statute between a police magistrate when acting either as such or as *ex officio* justice of the peace.

The conviction should be affirmed without costs.

MABEE, J., concurred in the judgment of the Chief Justice.

G. A. B.

[IN CHAMBERS].

SYMON V. THE GUELPH AND GODERICH R.W. CO.

1906

Sept. 25.

*Pleading—Joinder of Defendants—Election to Proceed Against.*

In an action brought against the Guelph and Goderich R.W. Co., the Canadian Pacific Railway, and the Canada Foundry Co., jointly, in which it was alleged that the plaintiff was employed by the Canadian Pacific Railway to work upon the construction of a line of railway being constructed by the Canadian Pacific Railway under the name of the Guelph and Goderich R.W. Co., leased and operated by the Canadian Pacific Railway, on which the Canada Foundry Co. agreed to construct a steel bridge, and the plaintiff was ordered by his employers to assist in that work and did so; that "the defendants" undertook the placing of the necessary girders and the plaintiff assisted on his employers' orders; that the work of placing the girders was so negligently done that he was injured; that the apparatus used, including the roadbed, was under the control of "the defendants;" that they were negligent in not providing a safe road-bed and efficient apparatus; that there were defects in the derrick and plan adopted, and that "the said accident happened by reason of the said negligence of the said defendants, and by reason thereof the plaintiff suffered the injuries herein complained of":—

*Held*, that the statement of claim sufficiently alleged a joint cause of action, and the plaintiff was not bound to elect against which of the several defendants he would proceed.

APPLICATION to compel the plaintiff to elect which of several defendants he would proceed against.

The motion was argued on the 20th of September, 1906, before Mr. Cartwright, the Master in Chambers.

The following statement of the pleadings and facts is taken from the judgment.

The statement of claim is to the following effect, and the action is brought against the Guelph and Goderich R.W. Co., the Canadian Pacific Railway, and the Canada Foundry Co., jointly.

The plaintiff was employed by the Canadian Pacific Railway to work upon the construction of a line of railway which was being constructed by the Canadian Pacific Railway under the name of the Guelph and Goderich R.W. Co., but which was leased and operated by the Canadian Pacific Railway.

During the progress of the work it became necessary to erect a steel bridge across the Grand River, and the Canada Foundry Co. agreed with the other defendant companies to construct the said bridge.

Master in  
Chambers.

1906

SYMON

v.

GUELPH  
AND  
GODERICH  
R.W.Co.

The plaintiff was ordered by his employers to assist in this work and did so. "The defendants" undertook the placing of the necessary girders and plaintiff assisted in this on his employers' orders. The remaining paragraphs allege that the work of laying the girders was so negligently done that the plaintiff was seriously injured. He alleges that all the apparatus used in placing the girders, including the road-bed upon which the cars rested, was under the control of "the defendants," and that they were negligent in not providing a suitable and safe road-bed as well as other proper and efficient apparatus. Certain specific defects are pointed out in the derrick used in laying the girders, and in the plan adopted for that purpose. In the last paragraph it is said: "The said accident happened by reason of the said negligence of the said defendants, and by reason thereof the plaintiff suffered the injuries herein complained of."

On this the Guelph and Goderich R.W. Co. have moved, requiring the plaintiff to elect against which defendant he will proceed, or else that he amend his statement of claim or furnish particulars which are fully set out and which if complied with might materially support the defendant's motion.

The plaintiff, without waiting for the motion to be heard, has furnished full particulars.

*Shirley Denison*, for the motion, and also on behalf of the Canadian Pacific Railway moved for a similar order.

*R. H. Greer*, for the Canada Foundry Co.

*Hugh Guthrie*, K.C., shewed cause.

September 25. THE MASTER IN CHAMBERS:—The only question at present is, whether the statement of claim sufficiently alleges a joint cause of action against all three defendants.

The defendants relied on *Hinds v. The Corporation of the Town of Barrie* (1903), 6 O.L.R. 656, and *Grandin v. New Ontario S.S. Co.* (1905), 6 O.W.R. 553. The plaintiff cited Con. Rule 192. But if he was obliged to rely on that rule he must fail as is shewn in *Quigley v. Waterloo Manufacturing Co.* (1901), 1 O.L.R. 606. The statement of claim in *Hinds v. Barrie*, *supra*, distinctly charged the two defendants with separate wrongful acts, and then alleged that the "effect of the combined acts of the defendants" injured the plaintiff.

It was unsuccessfully contended that this was a joint cause of action.

In *Grandin v. New Ontario S.S. Co.* the alleged wrongful acts are not so distinctly separated as in *Hinds v. Barrie*, though it appears that the plaintiff alleged a separate hiring by the railway company. There was there, too, no such joint responsibility arising out of an alleged common undertaking as is set up in the present case. Here, in the last paragraph, as confirmed by the particulars, there is *prima facie* a joint cause of action alleged. Whether or not this can be proved at the trial so as to maintain this assertion is not now to be determined. In disposing of the motion, however, the particulars given by plaintiff cannot be overlooked as they must be considered as amendments of the statement of claim when furnished at this stage of the action. See *Smith v. Boyd* (1897), 17 P.R. 463, at p. 467; *Milbank v. Milbank*, [1901] 1 Ch. 376, at p. 384; *Temperton v. Russell* (1893), 9 Times L.R. 319, *per* Bowen, L.J., at p. 322.

Here, if looked at in the most unfavourable light, the particulars of the twelfth paragraph might seem to set up a joint cause of action in respect of the road-bed against all the defendants, and a separate cause of action against the Foundry Company in respect of the derrick. From the view of Con. Rule 192 taken by plaintiff's counsel he no doubt thought that these, even if different causes of action, could be joined.

It might have been better to have waited before giving particulars. The motive of the haste was no doubt the desire to get to trial at Guelph Assizes next week if possible. As the statement of claim itself stands, "the defendants" spoken of throughout mean all the defendants. This, so far as the road-bed is concerned, is not qualified by the particulars. And in the seventh and following paragraphs there is a sufficient allegation of joint liability for the plaintiff's injury.

There might have been less difficulty in disposing of the motion if these particulars had not been furnished.

Even as the matter stands, it does not seem necessary to read the statement of claim in the light of the particulars, so as to require the plaintiff to elect. In paragraph D of the particulars, the plaintiff charges that all the defendants were engaged and concerned in placing the girders; and in paragraph F, that all the defendants are

Master in  
Chambers.

1906

SYMON  
v.

GUELPH  
AND  
GODERICH  
R.W. Co.



Master in  
Chambers.

1906

SYMON  
v.

GUELPH  
AND  
GODERICH  
R.W.Co.

responsible for the condition of the road-bed, and that in other respects (*i.e.*, I suppose, the derrick and its management) that the Foundry Company is referred to.

This latter part is ambiguous. It may, however, be taken to mean only that the Foundry Company was in charge of this *part of the joint operations*, in view of the statement of claim and the particulars, as a whole.

In any case the present motion will not have been useless. The plaintiff will perhaps find that if he succeeds in the action he will do so, as being the servant of all the three defendants, and can only recover damages accordingly. If it was a joint work, it must have been a joint employment.

It was said in one case by Bowen, L.J., that one party could not dictate to the other how he was to plead. And in *Hinds v. Barrie*, at p. 662, Osler, J.A., expressed his regret that the authorities required plaintiff to elect, and gave "liberty to amend by setting up, if she can, a joint cause of action."

It therefore seems right to dismiss the motions with costs in the cause. The defendants should plead within a week after the issue of this order. The plaintiff, if he desires to do so, can amend his particulars and statement of claim. This should be done before the order is issued so that the defendants may know what case they have to meet.

If the plaintiff is not making any separate claim against the Foundry Company this might be inserted in the order, and so any amendment by plaintiff may be unnecessary, if he is prepared to stand by his pleadings in their present shape.

G. A. B.

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IN CHAMBERS].

REID V. GOOLD.

1906.

Nov. 25

*Parties—Action Against Guarantors of a Promissory Note—Dispute Between Makers and Payee as to Amount Due—Adding Makers as Defendants.*

In an action against the guarantors of a promissory note for \$1,935.46, given by a company for machinery bought from the plaintiffs, it appeared that the company before the maturity of the note was claiming from the plaintiffs \$953.68 for breaches of the contract of sale, and it was alleged that when the note was given it was agreed that the exact amount should be adjusted during its currency. The defendants paid into Court \$1,195.01 as the amount justly due, and moved for an order adding the company as defendants:—

*Held*, that the defendants were entitled to the order.

THIS was a motion by the defendants in an action against them as guarantors of a promissory note for an order adding the maker of the note as a party defendant. The guarantee was endorsed on the back of the note.

The motion was argued in Chambers on the 21st of November, 1906, before Mr. Cartwright, Master in Chambers.

*W. T. Henderson*, for the motion.

*S. C. Biggs*, K.C., contra.

November 23. THE MASTER IN CHAMBERS:—About a year ago a limited company bought machinery from the plaintiff and gave the note sued on as payment.

The note was for \$1,935.46 and payable in a year. Before maturity the company was claiming from the plaintiff \$953.46 or thereabouts for breaches of the agreement of sale.

The plaintiff shortly afterwards sued the guarantors, who have paid into court \$1,195.01 as being all that is justly due. In their statement of defence they allege that the plaintiff agreed when the note was given that the exact amount should be adjusted during the currency of the note.

No doubt what is the correct application of Rule 206, sub-sec.

Master in  
Chambers

1906

REID  
v.

GOOLD.

(2)\* is not always obvious. This question was lately considered in *Imperial Paper Mills of Canada v. McDonald* (1906), 7 O.W.R. 472, where the ruling cases are cited. The reasons of the Chancellor in his manuscript judgment† in that case would seem to justify the present motion for which reliance was placed on *Montgomery v. Foy, Morgan & Co.*, [1895] 2 Q.B. 321. Of this case the Chancellor said: "*Montgomery v. Foy* involved the consideration of one contract for freight on the one hand against the consignees, and ultimately against the shippers the other party to the contract, and on the other hand of damages arising out of the breach of that contract which could be set off against the freight."

It was argued rightly that here the real question in controversy is whether any greater sum than the \$1,195.01 paid into court is due to the plaintiff. And if that is so, then the presence of the company is necessary so that the whole matter arising out of the contract may be disposed of in one action, which is one of the cardinal principles of the Judicature Act. Otherwise the defendants in this action would be obliged to get the company to bring a new action against the plaintiff for damages.

It was said by Lord Esher in *Montgomery v. Foy, supra*, at p. 325, that *Norris v. Beazley*—which was relied on in opposition to the motion—was open to observation, being decided at an early stage of the decisions on the Judicature Act. In the same case A. L. Smith, L.J., at p. 328, pointed out that if such an action for damages was brought while the first action was pending, the Court would order them to be tried at the same time, so that only the true balance should be paid to the plaintiff.

It will be seen that in *Norris v. Beazley* the action was against the person primarily liable. Even there the decision seems to have proceeded on the ground that the plaintiff had no possible claim against the Niger Merchants Co. in respect of the acceptance,

\* 206. (2) The Court or a Judge may, at any stage of the proceedings, either upon or without the application of either party, and upon such terms as may appear to the Court or Judge to be just, order that the name of a plaintiff or defendant improperly joined, be struck out and that any person who ought to have been joined, or whose presence is necessary in order to enable the Court effectually and completely to adjudicate upon the questions involved in the action, be added as plaintiff or defendant.

†Not reported in full in 7 O.W.R. 472.—Rep.

as the company was not in existence when it was given. And Denman, J., put his decision on the ground that the company was not "a necessary party" within the meaning of the Rule. Grove, J., also relies on the fact that the contract there was only between plaintiff and defendant, and that the Merchants Co. had nothing to do with the acceptance sued on.

The facts of the present case are widely different and much more favourable to the motion, which I think should be granted in the interests of justice and also of all the parties concerned. The guarantors should not be required to pay more than the amount which the plaintiff is entitled to recover on the contract of which the note sued on forms part. The company which gave the note should not be obliged to bring a separate action for damages when that claim can be conveniently and properly disposed of in this action, as it would have been, had the company been made a defendant originally.

The plaintiff will in this way be saved the risk of having to defend an action in Alberta, where the company's mill is situated, and also, it may be, their head office.

Above all, the interests of justice, as defined by the Judicature Act, sec. 57, sub-sec. 12, would seem to require that wherever it can possibly be done without injustice or inconvenience, one action should be sufficient "for the determination of all the matters which must be dealt with before the rights of the parties are finally settled: *per* Meredith, C.J., in *Morton v. Grand Trunk R.W. Co.* (1904), 8 O.L.R. 372, at p. 381, and so multiplicity of legal proceedings concerning any of such matters" may be avoided: Judicature Act, *supra*.

The company will no doubt facilitate the progress of the action and deliver a statement of defence as soon as served with the amended statement of claim. This can be set out in the order. The costs will be in the cause, as this question is always one of some difficulty.

Master in  
Chambers.

1906

REID  
v.

GOOLD.

G. A. B.



[BOYD, C.]

1906

McINTOSH V. LECKIE ET AL.

Oct. 17.

*Lease—Oil lands—Forfeiture clause—Contract—Lease or license—Profit a prendre—Construction.*

The defendant by written lease gave the plaintiff the exclusive right to drill on certain oil lands for five years from December 16th, 1903, "this lease to be null and void and no longer binding . . . if a well is not commenced . . . within six months, . . . unless the lessee shall thereafter pay yearly to the lessor \$50 per year for delay." No well had been begun by June 16th, 1904, when the first six months expired. On July 8th, 1904, the plaintiff paid the defendant \$50 by cheque, which the defendant cashed on August 10th, 1904, and receipted as "received on account of delay in beginning operations under the lease." In August, 1905, the plaintiff tendered the second yearly payment of \$50, which the defendant refused, having made another lease to his co-defendant on July 28th, 1905 :—

*Held*, that the second payment of \$50 was in time, and might have been validly made at any time during the second year which did not terminate until December 16th, 1905.

The legal effect of the instrument in question was more than a license : it conferred a profit a prendre, an incorporeal right to be exercised in the land comprised in it.

THIS was an action brought for a declaration that a lease or license to the plaintiff to prospect for oil and gas upon certain land had not been forfeited, and for possession, and to restrain the defendants from operating under a subsequent lease during the plaintiff's term. The action was tried before BOYD, C., at Sarnia, on October 17th, 1906.

W. J. Hanna and A. Weir, for the defendant Leckie, being first called on, contended that the document in question was not a lease but a license: *Lynch v. Seymour* (1888), 15 S.C.R. 341; *Burnside v. Marcus* (1867), 17 C.P. 430, 437; *Glenwood Lumber Co., Limited, v. Phillips*, [1904] A.C. 405; Amer. & Eng. Encycl. of Law, 2nd ed., vol. 18, p. 170; that there was a want of mutuality in it: *Fry on Specific Performance*, 4th ed., p. 203; that there had been a breach of the covenant implied in it to begin at once and go on continuously: *Sharp v. Wright* (1859), 28 Beav. 150; that the plaintiff knew of the revocation before he made his tender: *Homer v. Ashford* (1825), 3 Bing. 322; *Mitchell v. Reynolds* (1711), 1 P. Wms. 181; that there was no consideration on which to base a claim for specific performance; that the license was revocable at will: Amer. & Eng. Encyc. of Law, 2nd ed., vol. 18, p. 143. He also

referred to *Wycherley v. Wycherley* (1763), 2 Ed., 174, 177; *Eclipse Oil Co. v. South Penn. Oil Co.* (1899), 34 S.E. R. 923; *Foster v. Elk Fork Oil & Gas Co.* (1898), 90 Fed. 178; *Huggins v. Daley* (1900), 99 Fed. 606; *Federal Oil Co. v. Western Oil Co.* (1902), 112 Fed. 373; *Steelsmith v. Gartlan* (1898), 44 L.R. Annot. 107.

*J. Cowan*, K.C., for the plaintiff, contended that the instrument in question was a lease: *Seymour v. Lynch* (1885), 7 O.R. 471, 476; Thornton's Law Relating to Oil and Gas, pp. 62, 78; that if a license it was irrevocable: *Ackroyd v. Smith* (1850), 19 L.J.C.P. 315; S.C., Ruling Cases, vol. 10, pp. 1, 11; *Wood v. Manley* (1839), 11 A. & E. 34; *Winter v. Brockwell* (1807), 8 East 308; *Doe dem. Hanley v. Wood* (1819), 2 B. & Ald. 724; that the lessor, as in every case, gets a royalty which is a rent: *Allegheny Oil Co. v. Snyder* (1900), 106 Fed. R. 764; Thornton *ibid.* pp. 25; 85, 250; that "time of payment" has received judicial construction: Thornton *ibid.* p. 259; and that there was no want of mutuality.

*Weir*, in reply, contended that in the cases cited there was an obligation to pay a royalty, but that was not so here; that there was a year after forfeiture within which the penalty might be paid; that there could not be election by letter, but only by actual payment; that exclusive possession is essential to a lease.

*A. Weir* and *I. Greenizen*, for the other defendants.

The material terms of the instrument and the facts are stated in the judgment.

October 29. *BOYD, C.*—Under the terms of the document called a lease which is signed and sealed by the defendant, the plaintiff had the exclusive right to drill for petroleum and natural gas, by entering upon the lands described, for the term of five years from December 16th, 1903. The rights of the parties depend upon the construction of an annulling clause, which is thus expressed: "This lease to be null and void and no longer binding on either party if a well is not commenced on the premises within six months from this date, unless the lessee shall thereafter pay yearly to the lessor \$50 per year for delay."

The first six months expired on June 16th, 1904, and no well had been begun. The plaintiff wrote defendant on June 13th regarding delay, and stating that he would hold the lease valid by

*Boyd, C.*

1906

*McINTOSH*

*v.*

*LECKIE*

*ET AL.*

Boyd, C.  
1906  
McINTOSH  
v.  
LECKIE  
ET AL.

making the yearly payment. This first payment of \$50 was made by cheque dated July 8th, which was received and cashed by the defendant on August 10th, 1904, and a receipt therefor given on the back of the lease in these words: "Received from McIntosh \$50 on account of delay in beginning operations under within lease."

Early in August, 1905, the plaintiff tendered the second yearly payment of \$50, which was refused by the defendant. In his evidence, the defendant says that he thought the second payment should have been made before June 16th, 1905, and if it had been offered before that time he would have accepted it. Taking this view that the lease had ceased to be binding on him, the defendant in chief made another lease for oil purposes to his co-defendant on July 28th, 1905.

The plaintiff's lease was registered in May, 1904, and unless it has been avoided by what has occurred in the circumstances stated, it is evident that in the face of the Registration Act the defendants cannot claim to have the exclusive or indeed any rights to the oil products during the term of the plaintiff's lease.

The case was argued almost exclusively on American decisions. I have turned to those cited and others, but I do not think that many of those relied on for the defence are applicable to our system of jurisprudence. While papers such as the present are treated as dealing with profits *a prendre* and incorporeal hereditaments, yet the concluded agreement is regarded as subject to the flexible doctrines applied in cases of specific performance. And when circumstances of apparent hardship or of an unequal dealing are presented, the Court has held its hand and refused to enforce what appears to be the plain agreement of the parties.

There is no evidence of any unfair dealing or over-reaching by the lessee; both parties understood what was being done in granting this lease so called, and the defendant was willing to accept the penalty if it had been tendered in proper time. The contention then seems to be reduced to a narrow issue: was the defendant right in refusing to take the second \$50 tendered early in August, 1905?

The "lease" is for five years; a well is to be begun in six months, if not a yearly payment of \$50 is to be made for delay. If no well, the first payment is to be made "thereafter," *i.e.*, after the expiry of the six months or after June 16th, 1904. The defendant put an



interpretation upon the clause as to time when he received the first penalty payment on August 10th, 1904. The payment of \$50 is to be made "per year" and "yearly." The \$50 is for the whole of the first year in which default is made—it will cover from December, 1903, to December, 1904. Then \$50 is to be paid for the next year, not in advance, and if not so provided for, then at any time during the year. The tender in August, 1905, was within a year of the first payment, and it was within the second year of the lease and might have been validly made at any time during that second year. I think the defendant's position and contention is untenable that this second payment should have been made before June 16th, 1905, and he acted unadvisedly in granting another lease while yet the first was current. As to the time of payment, when something is to be paid per year or yearly, see *Nowery v. Connolly* (1869), 29 U.C.R. 39; *Turner v. Allday* (1836), Tyr. & Gr. 819, and *Lynch v. Versailles Fuel Gas Co.* (1895), 165 Penn. 518.

Much argument was directed to the position that this document was a one-sided, or unilateral contract of revocable nature at the option of the maker. I cannot take this view.

The legal effect of this instrument (by whatever name it may be called) is more than a license; it confers an exclusive right to conduct operations on the land in order to drill for and produce the subterranean oil or gas which may be there found during the period specified. It is a profit *a prendre*, an incorporeal right to be exercised in the land described: *Duke of Sutherland v. Heathcote*, [1892] 1 Ch. 475, 483.

In a Scotch appeal Lord Cairns says: "What we call a mineral lease is really, when properly considered, a sale out and out of a portion of the land. It is liberty given to a particular individual, for a specific length of time, to go into and under the land, and to get certain things there if he can find them, and to take them away, just as if he had bought so much of the soil": *Gowan v. Christie*, L.R. 2 Sc. App. 273, 284. See also *Funk v. Haldeman* (1867), 53 Penn. 229, 243.

It is said in *Sharpe v. Gordon* (1859), 28 Beav. 150, that when only a royalty rent is reserved and not a rent certain, there is an implied obligation to begin work at once, and this doctrine was here invoked as giving a right to rescind. But it is excluded by the terms of the contract, which provides for the very case of failure

Boyd, C.  
1906  
McINTOSH  
v.  
LECKIE  
ET AL.



Boyd, C.

1906

McINTOSH

v.

LECKIE

ET AL.

or delay in beginning operations and fixes the sum by way of penalty that shall then be paid per year.

The result is that the plaintiff is still entitled to the rights given by the "lease" he holds, and the defendants should be enjoined from operating for oil or gas in his territory during the currency of his term. He is entitled to possession for the purpose of experimenting or searching for oil and gas, and if he take the benefit of what has been done by the defendants or asks account of what profit they have made, it must be on terms of compensating them for the improvements, as to which there may be a reference to the local Master. Costs of action to the plaintiff.

A. H. F. L.

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## [DIVISIONAL COURT.]

FLEUTY V. ORR.

D. C.

1906

April 17.

Dec. 7.

*Negligence—Injury to Person by Fault of Driver of Vehicle in Highway—Liability of Owner—Relation between Owner and Driver—Master and Servant or Bailor and Bailee—Inference from Facts—Duty of Appellate Court.*

The defendant, an hotel keeper, being the possessor of an omnibus and horses, made an agreement with M. whereby, in consideration of M. driving the defendant's guests free to and from the railway stations, and paying the defendant 70 cents a day for the board of the horses at the defendant's stables, M. should be entitled to the use of the omnibus and horses, and to take for his own use all sums which he could earn by conveying passengers other than the defendant's guests, and by carrying luggage. The plaintiff was injured upon the highway owing to the negligence of M., who was driving the omnibus empty to one of the stations to meet an incoming train:—

*Held*, that the question whether the relation between the defendant and M. was that of master and servant or that of bailor and bailee was a question of fact, and the test was the existence of the right of control as to anything not necessarily involved in the proper performance of the work undertaken by M. for the defendant; and (CLUTE, J., dissenting), that the proper inference from the above facts and other facts in evidence (set out in the judgments) was that the relationship between the defendant and M. was that of bailor and bailee; and therefore the defendant was not responsible for the negligence of M.

*Saunders v. City of Toronto* (1899), 26 A.R. 265, followed.

There was no conflict of evidence, and the trial Judge drew inferences from the undisputed facts:—

*Held*, that an appellate court was at liberty (and *per* ANGLIN, J., was bound) to review the inferences of the trial Judge.

Judgment of the county court of Huron reversed.

AN appeal by the defendant from the judgment of the junior Judge of the county court of Huron in favour of the plaintiff in an action in that court for damages for personal injuries sustained by the plaintiff, in the circumstances mentioned in the judgment of the junior Judge, who tried the action without a jury.

April 17. HOLT, Jun. Co. C.J.:—The defendant is the owner of an hotel in the town of Wingham, known as the "Brunswick Hotel," and was such owner on the 5th November, 1904. For some time previous to this date he had an omnibus running to and from his hotel to the Grand Trunk Railway and Canadian Pacific Railway stations in Wingham for the purpose of carrying guests to and from the hotel, and also for carrying other persons who lived in the town and who wished to engage the omnibus to carry them from or to these stations.

Some time prior to the 5th November, 1904, the defendant made an arrangement with one Mullen whereby Mullen was to drive the

D. C.  
1906  
FLEUTY  
v.  
ORR.  
Holt, Co. J.

defendant's horses and omnibus to and from the above-named stations, and to carry all guests for the defendant's hotel free of charge, the horses being kept in the same stable as before, being the stable in connection with the hotel; Mullen to pay for the feed of the horses 70 or 75 cents a day, and Mullen to get as his remuneration whatever he could make from passengers who simply drove from one station to the other and who were not guests at the hotel—"transfers" these were called in the evidence—and to get also whatever charges he made for carrying luggage both for these "transfers" and for guests at the hotel, and also whatever he made from carrying all other passengers to private residences in the town.

This agreement, or a memorandum of it, is in writing in a book marked exhibit 2, which contains shortly the terms of this agreement, and bears date the 3rd October, 1904. This writing, it may be remarked, contains nothing which shews how long the arrangement was to continue.

The defendant's hotel is situated on the east side of Josephine street, this being the principal or main street of the town, and a considerable distance south of the Grand Trunk station. A new post office was, upon the 5th November, 1904, in course of construction in Wingham upon the east side of this street, and some distance north from the hotel, that is, between the hotel and the Grand Trunk station, and in front of it, upon the street and extending well to the centre of the street, was a large pile of stones for use in the building of this post office, which, as a matter of course, considerably narrowed the travelled portion of the street.

On the night of the 5th November, 1904, between 7 and 8 o'clock, Mullen, with these horses and this omnibus, was proceeding from the hotel northward to the Grand Trunk station, and, before reaching the southerly end of the pile of stones, collided with the plaintiff and her two companions, who were driving south in the opposite direction with a single horse and buggy, and the plaintiff and her two companions were thrown out of their buggy, the plaintiff being considerably hurt and bruised.

There are two questions arising in the case. First, was Mullen the servant of the defendant, that is, was the relationship between them that of master and servant? And second, was Mullen on the night in question guilty of driving in a negligent and careless

manner, and if so, was it through or by reason of his negligence that the accident happened?

I may say before proceeding further that the defendant at the trial stated in his evidence that he was not the owner of the horses or the omnibus at any time, but I cannot see that any thing turns upon this point, nor did counsel for the defendant so contend. I am of opinion that, so far as this case is concerned, the defendant must be considered the owner of both, as both had been lent to him for the purposes for which they were being used, and were used and kept and dealt with by him as if he were the owner.

Now, as to the first point, was Mullen the defendant's servant so as to make the defendant liable for Mullen's negligence, or was the position between them that of bailor and bailee? If the latter, then I presume the defendant would not be liable. It was very strenuously argued for the defendant that the position was that of bailor and bailee, and that the evidence given at the trial, together with the memorandum in exhibit 2, established the fact that the relation of master and servant did not exist. The question as to the relationship of the parties is one of fact and not of law, as stated by Lord Russell of Killowen in *Jones v. Scullard*, [1898] 2 Q.B. 565, approving of the view expressed by Lord Abinger in *Brady v. Giles* (1835), 1 Moo. & Rob. 494. This is also the view of Mr. Justice Osler in *Saunders v. City of Toronto* (1899), 26 A.R. 265, as well as that of the present Chief Justice Moss in the same case.

Now, what are the facts? The defendant is the owner of both the horses and the omnibus. Both are kept at his stable, which is in connection with his hotel, and the omnibus is known as that of the Brunswick Hotel, and continues to be so known after Mullen becomes the driver. It is run, to an extent at least, in connection with and for the benefit of the defendant and his hotel, and for so running it the driver is allowed to collect for his own use what he can make out of carrying luggage, and from carrying other passengers who are not guests of the hotel. Now, this all appears to me to be only another way of paying the driver wages for his services.

In the examination for discovery of the defendant the following questions and answers appear:—

D. C.

1906

FLEURY

v.  
ORR.

Holt, Co.J.



D. C.

1906

FLEUTY

v.

ORR.

Holt, Co.J.

"Q. 8. The day that the accident took place did you own a 'bus? A. No.

"Q. 9. Had you one running in connection with your hotel? A. I had a 'bus running.

"Q. 10. At that time you had a 'bus running from your hotel to the railway station? A. Yes.

"Q. 11. Who was the man driving it? A. Mr. James Mullen.

"Q. 12. Was the man hired and paid by you? A. He got the proceeds of what the 'bus and baggage earned.

"Q. 13. Was he hired by you? A. That was his wages. . . .

"Q. 86. Do you know which direction these people were driving in when they were run into? A. When they ran into *my rig* they must have been coming south, when our rig was going north."

Then again, the evidence disclosed the fact that any one in Wingham, other than the guests of the hotel, desiring to be driven to either of the stations in this omnibus, would leave their orders with the defendant or his clerk, either one of whom would communicate the orders to the driver Mullen. The evidence further disclosed the fact that the other omnibusses in the town were running free, and that this one was known as the Brunswick Hotel 'bus. Then again, the defendant admits that after the accident he paid one-half of the amount required for repairing the buggy which had been injured. The owner of the buggy, one Albert Thomas, and the defendant disagree as to the amount paid, but, whatever it was, the defendant paid one-half of it.

Now, as I am empowered to draw all proper inferences from the facts, it does seem to me that no other inference can be drawn from the above facts than that the relationship which existed between the defendant and the driver Mullen was that of master and servant, and that on the night in question the driver was the servant of the defendant, whilst driving the omnibus from the hotel to the Grand Trunk Railway station, for the purpose of conveying without charge any passengers there might be on the train then about arriving, wishing to go to the defendant's hotel. In coming to this conclusion I have not lost sight of the memorandum in exhibit 2, but I cannot see that this writing establishes the proposition urged by counsel for the defendant that the relationship between the parties was that of bailor and bailee.

The present case differs widely from many of the cases cited in the argument, to which I shall now shortly refer, and in this especially, that in this case, different to all the others, the driver was performing for the defendant certain services with the defendant's own horses and omnibus, for which he was being paid by being allowed to keep for his own use certain earnings of the omnibus and horses.

[The Judge then referred to and quoted from the following cases: *Powles v. Hider* (1856), 6 E. & B. 207; *Venables v. Smith* (1877), 2 Q.B.D. 279; *King v. London Improved Cab Co.* (1889), 23 Q.B.D. 281; *Keen v. Henry*, [1894] 1 Q.B. 292; *Milligan v. Wedge* (1840), 12 A. & E. 737; *Quarman v. Burnett* (1840), 6 M. & W. 499; *Jones v. Scullard*, [1898] 2 Q.B. 865; *Fowler v. Lock* (1872), L.R. 7 C.P. 272; *Jones v. Corporation of Liverpool* (1885), 14 Q.B.D. 890; *Saunders v. City of Toronto*, 26 A.R. 265.]

It is stated in the last mentioned case that the true test as to whether the liability exists is not the exercise of the power of control, but the right to exercise the power of control. If the element of personal control is found, the responsibility will attach.

Now, in the present case, it seems to me clear that the defendant had control of the driver Mullen, at least to a certain extent, that is, as to anything which would in any way relate to the carrying of the hotel guests, whom he was bound to carry free of expense.

I have given the case very careful consideration, and have exhausted all authority cited and any other that I could find, but have been unable to find a case on all fours with this. Many of the cases I have referred to have little, if any, application, owing to their having been decided upon Acts of Parliament which are not in force here. I can come, as I have already said, to no other conclusion than that the relationship existing between the defendant and the driver Mullen was that of master and servant.

This being so, then was there negligent driving on the part of the driver Mullen on the night in question? This question I must unhesitatingly answer in the affirmative. . . .

Taking into consideration the loss of wages, the medical account, and the pain and suffering occasioned to the plaintiff, I think a fair sum to allow her will be \$153 damages, and I direct judgment to be entered for the plaintiff at the expiration of 3 days for \$153 and costs.

D. C.  
1906  
FLEUTY  
v.  
ORR.  
Holt, Co.J.

D. C.  
1906  
FLEUTY  
v.  
ORR.

The defendant's appeal was heard by a Divisional Court composed of MULLOCK, C.J. Ex.D., ANGLIN and CLUTE, JJ., on the 21st September, 1906.

*E. L. Dickinson*, for the defendant. The main point is that Mullen was not the servant of the defendant, but a bailee of the omnibus. The evidence, however, does not disclose negligence on the part of Mullen, and does disclose negligence on the part of the plaintiff. It may be assumed for the purpose of the case that the defendant was the owner of the horses and omnibus. The driver paid the defendant for the board of the horses and keep of the vehicle, 70 cents a day. He contracted to drive passengers to and from the defendant's hotel free of charge, but received money from other passengers and made what he could out of them. The defendant had no control over Mullen, who was not his servant; if he had any control, it was not that kind of control which is the foundation of liability: *Beven on Negligence*, 2nd ed., vol. 1, p. 686; *King v. London Improved Cab Co.*, 23 Q.B.D. 281; *Keen v. Henry*, [1894] 1 Q.B. 292; *Venables v. Smith*, 2 Q.B.D. 279; *King v. Spurr* (1881), 8 Q.B.D. 104; *Fowler v. Lock*, L.R. 7 C.P. 272, 279, 280; *Saunders v. City of Toronto*, 26 A.R. 265, 272. Mullen was at liberty to employ another driver if he chose. He could not be a servant at one time and a bailee at another.

*W. Proudfoot*, K.C., for the plaintiff. On going to and returning from the stations Mullen was acting under the orders of the defendant. The arrangement was just a way of paying Mullen his wages. The English cases are under the Hackney Act, and no case is like this. The element of ownership is important. The master had control, and could have found fault with the servant if, for example, he had not driven to the station when due there. *Saunders v. City of Toronto*, 26 A.R. 265, turns on the ownership of the vehicle. I refer to the cases cited in that case, and to *Jones v. Scullard*, [1898] 2 Q.B. 565; *Beven on Employers' Liability*, 3rd ed., p. 137; *Limpus v. London General Omnibus Co.* (1862), 1 H. & C. 526; *Linnehan v. Rollins* (1884), 137 Mass. 123; *Sadler v. Henlock* (1855), 4 E. & B. 570; *Stephen v. Thurso Police Commissioners* (1876), 3 Court of Sess. Cas., 4th series, 535.

*Dickinson*, in reply.

December 7. MULOCK, C.J.:—This is an appeal from the judgment of the junior Judge of the county court of Huron. The facts are fully set forth in the judgment. Those which appear to me as bearing upon this appeal may be summarized as follows:

The defendant was an hotel keeper at the town of Wingham, and obtained possession of a pair of horses and an omnibus for the transportation of passengers and baggage between his hotel and the railway station. On the 2nd October, 1904, he entered into a contract with a man named Mullen whereby the latter was given the use of the omnibus and horses, and was entitled to keep for his own use all earnings from the omnibus, in consideration of his paying to the defendant 70 or 75 cents a day for the feed of the horses and use of the omnibus, and carrying by the omnibus, free of charge, between his hotel and the railway stations, all persons patronizing the defendant's hotel.

On the night in question Mullen was driving the omnibus to the station, when he collided with a carriage containing the plaintiff, whereby she was injured, and this action was brought to recover damages from the defendant because of the injury.

It is contended by the plaintiff that Mullen, while thus in personal charge of the omnibus, was the servant of the defendant, and that therefore the latter was responsible for Mullen's negligence.

Applying to this case the rule stated in *Saunders v. City of Toronto*, 26 A.R. 265, the test as to whether the relationship of master and servant existed between the defendant and Mullen is whether the defendant had the right to exercise personal control over Mullen when in charge of the omnibus.

The agreement between them is silent upon the point. Nevertheless, its true meaning is, I think, quite apparent.

The defendant's object was to secure free transportation by the omnibus for his guests. Mullen so understood it, and agreed to furnish such free transportation. The attainment of that result was the whole object of the defendant, it being immaterial to him who drove the vehicle, provided the desired end was attained. It was no term of the agreement that Mullen was to be in personal charge of the omnibus. So far as appears, it was intrusted to him at his own discretion, to be used or remain idle, except that the defendant's hotel should enjoy free service. Subject to this qualification, for the whole 24 hours of each day Mullen was entitled

D. C.

1906

FLEURY

v.

ORR.

Mulock, C.J.



D. C.

1906

FLEUTY

v.

ORR.

Mullock, C.J.

to the use of the omnibus for his own benefit. The full enjoyment of this right would necessarily have involved changes of horses and drivers. Yet this right he would not have been able to enjoy if he were the defendant's servant, for, as his servant, he could not, without his authority (which he had not), appoint other servants in his stead, or hire other horses, on the defendant's account. Thus, regard for Mullen's rights makes it necessary to reject the contention that the relationship of master and servant existed between the parties. Apart, however, from this illustration of the impossibility of giving effect to the agreement if Mullen were to be held to be a servant, it is to be observed that the parties themselves did not stipulate, and the defendant never attempted to control Mullen, as to the manner in which he should perform his contract, nor did Mullen submit to the defendant's directions. That Mullen considered himself entitled to manage the omnibus according to his own uncontrolled discretion is shewn by the fact that on one occasion, of his own motion and without consultation with the defendant, he appointed his son to drive in his place. In one respect only did the defendant assert any right, namely, by requiring the maintenance of a free omnibus service to his hotel. All the acts of the parties shew that their understanding of the arrangement was that, whilst the defendant was to be entitled to the free omnibus service, it was Mullen's right to arrange the means for the attainment of that end. Where such is the case, the result, and not the means of its attainment, being the subject matter of the agreement, the inference is that the relationship of master and servant does not arise: *Goldman v. Mason* (1888), 2 N.Y. Supp. 337; *Hexamer v. Webb* (1886), 101 N.Y. 377, 385. Whether Mullen was the defendant's servant is a question of fact, and, there being no conflict of evidence, we are at liberty to draw inferences.

For these reasons, being of opinion that the relation of master and servant was not established, and that consequently the defendant was not responsible for Mullen's negligence, I find myself, with great respect, unable to agree with the conclusions of the learned trial Judge, and think this appeal should be allowed with costs and the action dismissed with costs.

ANGLIN, J.:—The defendant appeals from the decision of Holt, junior Judge of the county court of Huron, finding him liable for

injuries sustained by the plaintiff as a result of a carriage in which she was driving been run into by an omnibus driven by one Mullen. The evidence abundantly supporting the finding that the collision was due to Mullen's negligence, the question for decision upon the present appeal is whether the relationship between the defendant, an hotel keeper, and Mullen, is that of master and servant, upon which the liability of the defendant would be clear, or that of bailor and bailee, which would not entail liability of the bailor.

This question depends upon the proper inference to be drawn from certain facts. With the facts as stated by the learned county court Judge the defendant, who appeals, does not quarrel. Counsel for the plaintiff also accepts the findings of fact, which do not at all depend upon credit given to one or more of several witnesses telling conflicting stories. Neither is there any suggestion of a want of *bona fides*, or that the arrangement between the defendant and Mullen was colourable or was entered into for the purpose of screening the former from liability.

It is not a question here whether there is any evidence from which a jury might have inferred the relationship to be that of master and servant, and of disturbing a jury finding based upon such evidence; it is not a question of interfering with findings of fact by a trial Judge based upon conflicting testimony; it is the case of an inference drawn from certain facts by a trial Judge, an inference which we are in quite as good a position to draw as he was. Such inferences when drawn by trial Judges, if, in the opinion of an appellate court, they are incorrect, are readily set aside, and it is a recognized duty of an appellate tribunal to review them: *Russell v. Lefrançois* (1883), 8 S.C.R. 335; *Gallagher v. Taylor* (1881), 5 S.C.R. 368; *The North Perth Election* (1892), 20 S.C.R. 331.

The material facts as found are as follows:—

The defendant was himself bailee of the horses and omnibus in question, but for the purposes of this action and appeal he may be deemed to have owned them. He made an agreement with Mullen by which, in consideration of Mullen driving free, to and from the Canadian Pacific and Grand Trunk stations in Wingham, all persons who were guests of the defendant's hotel, and paying to the defendant 70 cents *per diem* for the board of the horses at the de-

D. C.  
1906  
FLEURY  
v.  
ORR.  
Anglin, J.

D. C.  
1906  
FLETTY  
v.  
ORR.  
Anglin, J.

fendant's stable, Mullen should be entitled to the use of the omnibus and horses, and to take for his own use all sums which he could earn by conveying passengers, other than guests of the defendant, and by carrying baggage, whether to or from the defendant's hotel or elsewhere. On the night in question, when the plaintiff was injured, the defendant was driving to one of the railway stations with an empty 'bus, to meet an incoming train. Whether hotel guests in fact arrived or were expected to arrive by such train does not appear in evidence. The omnibus was called "the Brunswick Hotel 'bus." The defendant had had similar arrangements with other persons who had acted as drivers before the arrangement was made with Mullen. Except that Mullen was obliged by this arrangement to meet all the trains arriving at Wingham and to convey to the hotel intending guests, and to convey to all trains departing from Wingham guests of the Brunswick Hotel, he was at liberty to use the horses and omnibus as he pleased. In the course of the defendant's examination for discovery he spoke of Mullen's receipts from the use of the omnibus as "his wages," and Mullen at the trial said that it was a term of his bargain with the defendant that he should take what he could make "for his wages." Except these two casual statements and a statement of the defendant that if Mullen did not run the 'bus right, he (the defendant) "would have told him to get off the job," and one or two apparently inadvertent answers by the defendant to leading questions into which the words "employ" and "employment" were ingeniously introduced, there is nothing to indicate that the parties to the foregoing arrangement considered their relation to be that of master and servant. On the other hand, the defendant disclaims control of Mullen more than once, and Mullen swears that he was not under orders from the defendant.

From these facts and upon this evidence the learned junior county Judge has drawn the inference that the relationship between the defendant and Mullen was that of master and servant.

Was the free carriage of the hotel passengers and the 70 cents a day board money the hire paid by Mullen to the defendant for the horses and 'bus, or were the moneys collected by Mullen from other passengers and for the carriage of baggage his wages for running the 'bus as the defendant's servant?



The true test of whether one man is the servant of another is the answer to the question, is the former under the control of the latter. *Saunders v. City of Toronto*, 26 A.R. 265, 270, 272.

The onus is on the plaintiff to prove that the relationship of the defendant and Mullen was that of master and servant. I find no evidence that would warrant the conclusion—adapting the language of Osler, J.A.—that the defendant “had the power of controlling the work he (Mullen) was doing for him (the defendant) *in respect of anything not necessarily involved in the proper doing of the work.* . . . He could not have placed another driver in charge or have ordered Mullen to take care of the horses in any particular manner, as by driving fast or slow or on one side of the road or on the other, nor does it appear that he (the defendant) would have had any right to complain if, instead of driving himself, Mullen had chosen to place his son or any one else in charge of the vehicle for the hour or for the day.”

In *Venables v. Smith*, 2 Q.B.D. 279, Cockburn, C.J., dealing with a case in which a driver had agreed to pay 16 shillings a day for the use of a cab, making what he could by the use of it, said at p. 282: “I agree that, independently of the Act of Parliament relating to this subject, the relation between them (the owner and the driver) would be that of bailor and bailee, not that of master and servant.”

In *King v. London Improved Cab Co.*, 23 Q.B.D. 281, Lord Esher, at p. 283, says: “In my opinion the agreement proved to have been made between them and the driver did not constitute the latter their servant. The payment of a certain sum to the proprietor every day and the retention of the remainder of the earnings may be considered as a mode of payment of wages, but it seems to me that the agreement did not give to the proprietor such control as he would have over a servant.” Lopes, L.J., at p. 284, says: “If it were not for the Act of Parliament I should have said that the relationship between the cab proprietor and the driver was that of bailor and bailee.” This case was followed in *Keen v. Henry*, [1894] 1 Q.B. 292. In *King v. Spurr*, 8 Q.B.D. 104, Grove, J., at p. 106, says of a case in which the cab-proprietor let his cab on hire for a weekly payment of 10 shillings to a driver who supplied his own horse and whip: “If we consider the position of the parties without reference to any Act of Parliament, it appears

D. C.  
1906  
FLEURY  
v.  
ORR.  
Anglin, J.



D. C.

1906

FLEURY

v.

ORR.

Anglin, J.

undoubtedly to be that of bailor and bailee, and not of master and servant, for the defendant had nothing to do with the driver beyond receiving a weekly payment from him, and it was impossible for the master to exercise any control of a master over the driver." Bowen, J., said at p. 108: "Putting statutes aside, the relation in this case of the proprietor and driver of the cab would be simply that of bailor and bailee."

Apart from his contractual obligation to meet all trains and to convey Brunswick Hotel passengers to and fro free of charge, Mullen was at liberty to come and go with the 'bus and horses when and as he pleased; to carry what passengers and baggage he liked; and to use the 'bus and horses as he deemed best in his own interest.

The accidental allusions to the receipts of Mullen, made by the defendant and by Mullen himself, as wages, are merely instances of the misuse of words by persons lacking appreciation of their precise meaning and effect. Such accidental slips—while strongly indicative of honesty—in my opinion afford little assistance in determining the true legal relationship of these persons one to the other. On the other hand, all idea of improper design on the part of the defendant and Mullen in making the arrangement which they entered into being excluded, the circumstance that Mullen was to pay the defendant 70 cents a day for the board of the horses seems wholly inconsistent with the idea that Mullen was the servant of the latter.

If, instead of carrying Brunswick Hotel passengers free, Mullen had agreed to pay a fixed sum approximately equivalent to their 'bus fares to the defendant, it would be scarcely possible to argue that the relationship was other than that of bailor and bailee. I cannot see how the true character of that relationship is altered by the fact that in lieu of paying to the defendant a certain sum in cash for the use of the horses and 'bus, Mullen contracts to carry certain passengers for the defendant free of charge.

The supreme test is undoubtedly the existence of the right of control as to anything not necessarily involved in the proper performance of the work undertaken by Mullen for the defendant. Had the defendant anything more than a contractual right to insist that Mullen should do that which he had bargained to do? I can find no evidence that he had. On the contrary, I think all the evidence tends to prove that as to the manner and method of

driving and using the 'bus and horses—subject only to his contractual obligation to carry certain passengers for the defendant—Mullen was as free and unfettered as he would have been if paying a certain sum in money for hire of the horses and the omnibus.

The proper inference from the facts in evidence is, I think, that the relationship between the defendant and the driver Mullen was not that of master and servant, but that of bailor and bailee. That inference we are not only at liberty but are, as I have pointed out, upon the authorities, bound to draw.

The appeal should, in my opinion, therefore, be allowed with costs and the action dismissed with costs.

CLUTE, J.:—The facts are sufficiently stated in the carefully prepared judgment of the learned county court Judge.

The question is one of fact. As is said by Osler, J.A., in *Saunders v. City of Toronto*, 26 A.R. at p. 273: "There is . . . much confusion in the authorities and much depends on the exact conditions of the employment and the exact circumstances of the case." The true test in a case of this kind is said to be, the right to exercise the power of control, and this would seem to be so whether the wrongdoer be a contractor who is subject to the control of his employer or a servant: *per* Burton, C.J.O., in the *Saunders* case, at p. 270.

I think there was evidence from which a jury might reasonably come to the conclusion that Mullen was the servant of the defendant, and acting in the course of his employment and subject to his control at the time of the accident. The trial Judge having reached this conclusion, I see no reason to disturb his findings. Indeed, aside altogether from the evidence of Mullen, I think a jury might well reach the same conclusion.

The defendant has control of the horses and 'bus; keeps them at his stables; desires to have the 'bus run as a free 'bus in connection with his hotel; had it run in that way by two men prior to Mullen, the men receiving for their remuneration all they could make outside the hotel. On the occasion in question the 'bus was proceeding empty from the hotel to the station, on the defendant's business, to convey guests, if there were any, to his hotel free of charge. I do not think Mullen could have assigned any one else to do this work, and I think the fair inference is, that he was hired to do this work, and received as his remuneration what he could make on the side.

D. C.  
1906  
FLEUTY  
v.  
ORR.  
Anglin, J.

D. C.  
1906  
FLEUTY  
v.  
ORR.  
Clute, J.

If the accident had occurred while he was conveying some person to a place other than the hotel, a different, and to my mind more difficult, question would have presented itself for decision. What seems to me the natural inference is confirmed by the evidence of the defendant and Mullen.

The defendant is asked:

"Q. Was the man hired and paid by you? A. He got the proceeds of what the 'bus and baggage earned.

"Q. Was he hired by you? A. That was his wages."

Mullen puts it in this way:

"Q. What were the terms that you made with Mr. Orr with regard to that? A. There was a fellow by the name of Barlow (I think it is) was driving this 'bus, and I had knowed him almost from an infant, and he said to me one day, this would be a pretty good job for you; I am going to leave; he says, I have all I can make on this 'bus; *that is all I do*; and I pay for the horses' feed. And I said no more about that, and in a few days he left, and Mr. Orr's daughter came up after me.

"Q. All I want are the terms. A. She said her father wanted to see me, and I came down, and he told me that 'Barlow' or 'Burley' had left, and he says you can go on the same as he was doing, take what you can make for your wages and give me 75 cents a day for the horses' feed, and I went on that."

Here it is stated that the previous man engaged had left. Left what, except his employment? "Take what you can make for your wages." I see no reason to take this to mean something different from what it says. The parties themselves called the remuneration wages. If a Judge or jury should do the same, I do not see how the defendant would be in a position to complain.

The English cases referred to at the bar were decided under the Hackney Acts, which clearly contemplate that the party who engages a cab under the care of the driver shall have a remedy against the proprietor. The ground of some of the decisions, however, throws much light upon the present question.

In *Powles v. Hider*, 6 E. & B. 207, a cab plying in the streets in London in the ordinary way was hired by P. to carry his luggage. The luggage was lost by the fault of the driver. On the cab was the name of H. as proprietor of it, which he in fact was. Y., a licensed driver, was actually driving at the time. P. sued H. on a



contract to carry his luggage. Plea: denying the liability. On the trial it appeared that Y. each day paid a sum of money to H. for the use of a cab and two horses for the day, depositing his license with H. before he took the cab out, in compliance with the Hackney Acts; and Y. made what he could by the use of the cab and horses. It was held that the action was rightly brought against the proprietor. I refer to the case for the observations of Campbell, C.J., wherein he says (p. 212): "But, looking to the position of the proprietor and the driver of a cab, under the circumstances proved, and to the Acts of Parliament which regulate their respective duties, we are of opinion that the driver is to be considered the servant or agent of the proprietor, with authority to enter into contracts for the employment of the cab on which the proprietor is liable. There can be no doubt that this would be so, if the driver were engaged at fixed wages, accounting to the proprietor for all the earnings of the cab. But must not the actual arrangement between them be equally considered a mode by which the proprietor receives what may be estimated as the average earnings of the cab, minus a reasonable compensation to the driver for his labour? To stimulate the industry and zeal of the driver, he is allowed to pocket all the earnings of the cab, above a given sum: but it is from the earnings of the cab that this sum is paid; and it is evidently calculated on both sides that the earnings of the cab will exceed this sum, which varies according to the season of the year. This is quite different from hiring a job carriage or a carriage and horses to be driven by the hirer or his servant, where the hirer becomes bailee, and can in no sense be considered the servant of the proprietor. . . . It would be most inconvenient and unjust towards the public if an action, such as the present, brought against one who proclaimed himself to be the actual proprietor of the cab, when it was engaged by the plaintiff, and actually was so, could be defeated by evidence of a secret agreement between the proprietor and the driver with respect to the remuneration of the driver, and the proportions in which the earnings of the cab are to be divided between them."

It is true that this case is decided on the facts having regard to the Hackney Acts. But, having regard to the facts in that case and the present, what is here disclosed to the public, was in fact what the Hackney Act provided for; that is, in that case provision

D. C.

1906FLEURY

v.

ORR.Clute, J.



D. C.  
1906  
FLEUTY  
v.  
ORR.  
Clute, J.

was made that every hackney carriage should have on it a plate with the christian and surname of the proprietor of such hackney carriage, and the cab in question in that case had upon it a plate with the name of the defendant as the proprietor. It was held in that case that "the proprietor who applies for and accepts a license to which such a condition is annexed, and employs his cab under it, must be considered to hold himself out to the world as the proprietor; and he must incur the liabilities of proprietor to all who use the cab with the authority of the driver in the ordinary course of dealing."

We have no such Act in this Province, but in the present case the landlord did hold himself out as the proprietor of the cab by running a free 'bus, and it was during the time that the 'bus was being so run, expressly for his benefit under the arrangement, that the accident occurred.

In *Venables v. Smith*, 2 Q.B.D. 279, where the driver was to pay 16 shillings for the cab, and all that he made above that sum was his perquisite for his labour, and any deficiency he had to make good afterwards, Cockburn, C.J., said, p. 282: "I agree that, independently of the Acts of Parliament relating to this subject, the relation between them would be that of bailor and bailee, not that of master and servant. The cab proprietor hands over the horse and cab to the charge of the driver, to be used by him for the purpose of plying for hire at his own discretion and not subject to the proprietor's control."

In the present case, so far from the 'bus being handed over to the driver to ply at his own discretion, the very object of the arrangement was that it should be run for the benefit of the defendant, for the purpose of conveying his guests free of charge to and from his hotel, and it was subject to that understanding that the driver was permitted to use the 'bus when not so engaged, and to take the proceeds for his services.

The English cases prior to the Hackney Acts throw light upon the present question. In the case of *Laugher v. Pointer* (1826), 5 B. & C. 547, the question of liability is much discussed. There the owner of a carriage hired of a stable-keeper a pair of horses to draw it for a day, and the owner of the horses provided a driver, through whose negligent driving injury was done to a horse belonging to a third person. Held, by Abbott, C.J., and Littledale, C.J.,

that the owner of the carriage was not liable to be sued for such injury, Bayley and Holroyd, JJ., dissenting.

In *Dean v. Branthwaite* (1803), 5 Esp. 35, and *Sammell v. Wright* (1805), *ib.* 263, Lord Ellenborough held that where horses are let for the day the owner is liable for accidents produced by the misconduct of the drivers. The question is also very fully discussed in *Quarman v. Burnett*, 6 M. & W. 499. At p. 509, Parke, B., says: "Upon the principle that *qui facit per alium facit per se*, the master is responsible for the acts of his servant; and that person is undoubtedly liable, who stood in relation of master to the wrongdoer—he who had selected him as his servant, from the knowledge of or belief in his skill and care, and *who could remove him for misconduct*, and *whose orders he was bound to receive and obey*."

In *Patten v. Rea* (1857), 2 C.B.N.S. 606, the facts were as follows. The defendant was proprietor of a repository for the sale of horses. Taylor was his manager. He had a horse and gig which were kept for him on the premises of the defendant free of charge, and which he was in the habit of using when going out upon the defendant's business. One Smith had bought a horse at the defendant's repository, which he ought to have paid for at the office on the premises, but had not done so. Taylor was going in the gig to see his medical attendant, and also purposed to call upon Smith for payment of the debt he owed to the defendant for the horse, and whilst on his way to the former place and before he got to Smith, he negligently ran against and killed a horse belonging to the plaintiff. On the part of the plaintiff it was insisted that, although the horse and gig were the property of Taylor, yet, as at the time of the accident he was using it in the defendant's business and with his knowledge, the defendant was liable. The contrary was contended on the part of the defendant. In answer to questions put to them by the learned trial Judge, the jury found that on the occasion in question there was *no verbal request by the defendant to Taylor to go with the horse and gig upon the defendant's business, but that Taylor went on the journey upon the business of the defendant; and that the defendant knew it and assented to it*. Upon this finding the defendant's counsel claimed to have the verdict entered for him upon the second and third issues. The trial Judge ruled, however, that the plaintiff was entitled to recover. It was held that the defendant was responsible and that it was immaterial that Taylor was going also on private business of his own.

D. C.

1906

FLEURY

v.  
ORR.

Clute, J.

D. C.  
1906  
FLEUTY  
v.  
ORR.  
Clute, J.

Cockburn, C.J., at p. 612, says: "I think there was abundant evidence here that Taylor was driving, at the time the accident occurred, with the defendant's authority and in the course of business as his servant."

Williams, J., at p. 614, says: "It clearly is not necessary in cases of this sort that there should be any express request: the jury may imply a request or assent from the general nature of the servant's duty and employment. There was ample evidence of such implied request or assent here."

Willes, J., quotes Lord Holt in *Turberville v. Stampe* (1698), 1<sup>st</sup> Lord Raym. 264, that "a master is responsible for all the acts done by his servant in the course of his employment, though without particular directions."

In *Booth v. Mister* (1835), 7 C. & P. 66, it was held that the defendant will be liable although it should appear that the defendant's servant was not driving at the time of the accident, but had intrusted the reins to a stranger, who was riding with him, and was not in the service of the defendant.

In *Moreton v. Hardern* (1825), 4 B. & C. 223, the action was brought against three defendants, proprietors of a stage-coach. It appeared in evidence that one of the defendants was driving at the time when the accident happened, and the jury found that it happened through his negligent driving. Held, that the plaintiff might maintain case against all the proprietors, although he might perhaps have been entitled to bring trespass against the one that drove the coach.

But, even if it could be held that the relation of master and servant did not exist between the defendant and the driver of the 'bus, yet at the very least it seems to me there was a common enterprise in which the defendant and the driver were mutually interested for their mutual benefit, and for which they were both liable for negligence on the part of either in the conduct of that enterprise. There could be no doubt of this, I think, if the arrangement had been that the fares collected should be equally divided between them. They were divided between them, though, perhaps, not equally; the defendant getting the benefits of the free 'bus and payment for his horses' feed, and Mullen receiving all he could make in addition.



I do not see how it is possible to say that the defendant may take the benefit of the work of the driver and of the 'bus, and not be responsible to a stranger who is injured by the negligence of the driver while discharging the duty, of the benefit of which the defendant is the recipient.

In support of this view I refer to *Waland v. Elkins* (1816), 1 Stark. 272, where it was held that where A. and B. are jointly interested in the profits of a stage-waggon, but by a private agreement between themselves each undertakes the conducting and management of the waggon with his own driver and horses for specific distances, they are, notwithstanding this private agreement, jointly responsible to third persons for the negligence of their drivers throughout the whole distance. See also *Fromont v. Coupland* (1824), 2 Bing. 170; Roscoe's N. P., 17th ed., p. 763.

In *Saunders v. City of Toronto*, *supra*, much weight is given by the Chief Justice to the fact that the city of Toronto did not own the horses and cart. At p. 268, Burton, C.J.O., says: "The fact that McGowan was engaged with his horses and cart to my mind makes all the difference."

*Stephen v. Thurso Police Commissioners*, 3 Court of Sess. Cas., 4th series, at p. 542, is quoted with approval by Burton, C.J.O. The quotation is as follows:

"On the other hand, if an employer has no such personal control, but has merely the right to reject work that is ill done, or to stop work that is not being rightly done, but has no power over the person or time of the workman or artizan employed, then he will not be their superior in the sense of the maxim, and not answerable for their fault or negligence."

In the present case I think with deference that it cannot be doubted that the defendant had control over Mullen while he was running a free 'bus for the defendant's hotel, and the accident having occurred during this time, the defendant, in my judgment, is liable, and the appeal should be dismissed with costs.

*Appeal allowed with costs and action dismissed with costs;*

CLUTE, J., *dissenting*.

D. C.

1906

FLEURY

v.

ORR.

Clute, J.



[IN CHAMBERS.]

1906

PRESTON V. THE TORONTO R.W. CO.

Dec. 3.

*Damages—Abandonment of Portion of—Claim Held to be Limited to Balance—  
Appeal to Privy Council.*

The plaintiff, in a Superior Court, may at any time abandon a part of his claim and upon such abandonment the remainder only is deemed to be in controversy.

On the trial of an action in which the damages were laid at \$5,000, a nonsuit was entered, but it was agreed that in case the plaintiff should, on appeal, be held entitled to maintain the action, the damages should be fixed at \$1,000. On appeal to a Divisional Court, the plaintiff was held so entitled, and a new trial was directed unless the defendants consented to judgment for the \$1,000. This the defendants refused to do, and appealed to the Court of Appeal, when the judgment of the Divisional Court was affirmed. An application was then made for leave to appeal to the Privy Council, on the ground that the matter in controversy exceeded \$4,000. In answer thereto the plaintiff, by affidavit, stated that he was only claiming \$1,000, which he regarded as agreed upon for all purposes, and offered to amend his statement of claim:—

*Held*, that the application must be refused, as the damages must be deemed to be limited to the \$1,000.

THIS was a motion by the defendants to allow security on an appeal to the Privy Council from the judgment of the Court of Appeal ordering a new trial.

The plaintiff in his statement of claim claimed \$5,000 as damages for injuries received in a collision with a street car operated by the defendants' servants. At the trial before the Chancellor and a jury, the defendants' motion for a nonsuit was granted, and the action dismissed with costs, but by agreement the damages were fixed at \$1,000 in case an appellate court should hold the plaintiff entitled to recover.

A Divisional Court reversed the judgment at the trial, and ordered a new trial, unless the defendants consented to judgment for \$1,000. The defendants did not consent, and the judgment actually issued simply directed a new trial, and that the defendants should pay the costs of the previous trial and of the appeal.

The defendants then appealed to the Court of Appeal, and the appeal was dismissed with costs.

On November 23rd, 1906, the application was heard before GARROW, J.A., in Chambers.

*Leighton McCarthy*, K.C., for the applicants.

*Shirley Denison*, contra.

December 3. GARROW, J.A.:—Section 1 of R.S.O. 1897, ch. 48, gives a right of appeal to the Privy Council where the matter in controversy exceeds the sum or value of \$4,000.

On this application the plaintiff by his counsel alleges and supports his allegation by an affidavit made by the plaintiff that he is not now claiming more than the \$1,000 agreed upon at the trial, which he regarded as having been agreed upon for all purposes in lieu of the amount originally demanded in the statement of claim, and undertakes to amend the statement of claim, if necessary, to so limit his claim. A plaintiff in a superior court may at any stage, in my opinion, abandon a part of his claim, and upon such abandonment only the remainder can be said to be in controversy. I therefore think that whether the agreement as to damages at the trial had the permanent effect claimed by the plaintiff or not, I must regard his abandonment before me of all claim in excess of \$1,000, for damages, and consequently must refuse this application.

The order may recite the abandonment of all damages in excess of \$1,000, which will, I suppose, be sufficient without a formal amendment of the statement of claim.

The costs should, I think, be costs in the cause.

G. F. H.

Garrow, J.A.

1906

PRESTON  
v.  
TORONTO  
R.W.Co.

D. C.

1906

Oct. 22.

[DIVISIONAL COURT.]

RE BELL AND THE MUNICIPAL CORPORATION OF THE  
TOWNSHIP OF ELMA.

*Intoxicating Liquors—Local Option By-law—Omission of Essential Part—Quashing—Con. Mun. Act, 1903 (O.), secs. 204, 341 and 342.*

The omission in a local option by-law of the time and place where the votes are to be summed up, as provided by secs. 341 and 342 of the Con. Mun. Act, 1903 (O.), is the omission of an essential part of and makes the by-law invalid, and sec. 204 of the Act does not apply to cure the defect, as such omission is more than an irregularity.  
Judgment of Anglin, J., reversed.

THIS was an appeal from a judgment of Anglin, J., refusing to quash a local option by-law passed by the corporation of the township of Elma.

It appeared that the day before the taking of the poll the township clerk, who had been appointed deputy returning officer at one of the polling sub-divisions, was taken ill, and was unable in consequence to attend to any of his duties. He requested one John Morrison to act in his place as such deputy returning officer, and he did so and took the votes without any other authority than such request. He also requested one James Donaldson to finally sum up the votes cast for and against the by-law, and he in so doing only obtained possession of five out of eight of the ballot boxes containing the returns of the deputy returning officers, and relied on a memorandum in writing from the township clerk as the result from the other three ballot boxes and polling sub-divisions.

It also appeared that the township council did not by the by-law fix a time and place for the final summing up of the votes by the township clerk, and that no one attended with James Donaldson when he summed up the votes for the township clerk.\*

The appeal was argued on the 22nd and 23rd of October, 1906, before a Divisional Court composed of FALCONBRIDGE, C.J.K.B., BRITTON, and MABEE, JJ.

\* There were other objections argued, but as they were not mentioned in the judgment they are not referred to.—Rep.

*Haverson*, K.C., for the appeal, contended that the by-law was defective on its face in that it was only part of a by-law, a constituent part being omitted; that the by-law was bad before it reached the electors; that a time and place for summing up must be fixed under secs. 341 and 342 of the Consolidated Municipal Act, 1903, 3 Edw. VII. (O.); that no one attended when that was done by the clerk's substitute; that the clerk had no power to delegate his authority to Donaldson; and referred to *In re Salter and The Township of Beckwith* (1902), 4 O.L.R. 51; *Cartwright v. The Municipal Corporation of the Town of Napanee* (1905), 11 O.L.R. 69; *Re Dillon and Village of Cardinal* (1905), 10 O.L.R. 371; *Re Pickett and Township of Wainfleet* (1897), 28 O.R. 464; *The Queen ex rel. St. Louis v. Reaume* (1895), 26 O.R. 460; *Re McCartee and The Corporation of the Township of Mulmur* (1900), 32 O.R. 69; *The Hackney Case* (1874), 2 O'M. & H. 77.

*H. B. Morphy*, contra, contended that the by-law should not be interfered with as the taking of the votes was fair, and the will of the electors was shewn by the large majority in favour of it; that the sickness of the clerk was sudden and could not have been foreseen and no objection could be taken to his substitute; that the summing up was a part of the taking of the vote, and was covered by sec. 204 of the Consolidated Municipal Act, 1903; and that the Court should not be too strict in dealing with irregularities, and referred to *Re Young and Township of Binbrook* (1899), 31 O.R. 108.

At the close of the argument the judgment of the Court was delivered by FALCONBRIDGE, C.J., :—Holding that the requisites of secs. 341 and 342, which were positive directions of the statute, had not been complied with; that the curative sec. 204\* did not apply, as an essential part of the by-law, which was more than an irregularity, had been omitted, and the by-law must be quashed with costs.

\*204. No election shall be declared invalid by reason of a non-compliance with the provisions of this Act as to the taking of the poll or the counting of the votes, or by reason of any mistake in the use of the forms contained in the Schedules to this Act, or by reason of any irregularity, if it appears to the tribunal having cognizance of the question that the election was conducted in accordance with the principles laid down in this Act, and that such non-compliance, mistake or irregularity did not affect the result of the election.

D. C.

1906

RE BELL  
AND  
CORPORATION OF  
ELMA.



## [DIVISIONAL COURT.]

D. C. IN RE WILSON AND TORONTO GENERAL TRUSTS CORPORATION.  
1906

Nov. 26. *Surrogate Courts—Taking accounts—Jurisdiction to rescind Order on account of mistake.—Con. Rule 642.*

A surrogate Judge acting as the surrogate court has inherent jurisdiction to set aside an order which he has been induced to make by fraud of the applicant, and also to set aside or vary an order which he has made by mistake, though not to correct errors made in the judicial determination by him of any question; thus in this case it was held that he had jurisdiction to vacate an order made by himself upon the taking of executors' accounts and to reopen the accounts and further investigate them without reference to the order made.

The acts of the surrogate Judge in passing accounts of executors are those of the Court and not of the Judge as *persona designata*.

Consolidated Rule 642, which substitutes a proceeding by petition for the practice of filing certain kinds of bills abolished by the General Order of 1853, does not apply to a petition to a surrogate Judge to vacate an order made by him on the passing of executors' accounts, but must be confined to cases in which under the former practice such relief as is mentioned in it could be obtained by one or other of such bills.

THIS was a motion on behalf of Emma Wilson, wife of the late Sir Adam Wilson, by way of appeal from the judgment or order of His Honour Judge Winchester, Judge of the surrogate court of the county of York, of June 11th, 1906, dismissing with costs the petition of the appellant to set aside the order made by the said Judge on January 5th, 1905, on the passing of the accounts of the executors and trustees of the estate of the late Sir Adam Wilson, and to re-open the accounts of the estate, and to further investigate the accounts of the estate now on the files of the court without reference to the said order, and for an order to set aside the said judgment or order and enter judgment for the appellant.

Amongst other grounds of appeal set up in the notice of motion was that the application to the surrogate Judge was one which it was incumbent upon him to grant; that he had certified that he had audited and passed the accounts, which included the investments of capital and the two accounts known as the Burk and Barnett's accounts, but he had not actually audited or vouched the said investments or the payments in the other two accounts, and that his findings in the order objected to ought not to be conclusive upon the petitioner, nor should they preclude her going into the same.

The prayer of the appellant in the petition above referred to to the Judge of the surrogate court was that the order of January 5th, 1905, might be set aside and vacated, and that the accounts of the estate might be re-opened, and that the said accounts then on the file of this court might be further investigated by the surrogate court without reference to the said order.

The appeal was argued on October 31st and November 1st, 1906, before MEREDITH, C.J.C.P., and MACMAHON and ANGLIN, JJ.

*G. F. Shepley*, K.C., and *J. H. Moss*, for the respondents, the Toronto General Trusts Corporation, took the preliminary objection that the surrogate court Judge had no jurisdiction to set aside his order and re-open the accounts, citing *Cunnington v. Cunningham* (1901), 2 O.L.R. 511; *Re Russell* (1904), 8 O.L.R. 481; *In re McIntyre* (1906), 11 O.L.R. 136.

*F. E. Hodgins*, K.C., and *D. T. Symons*, for the appellants, contended that the right course had been adopted in applying first to the surrogate court Judge to set aside his own order, that the practice of the surrogate court was analogous to that of the High Court, and that every Court has jurisdiction to correct its own errors and mistakes: *Watkin v. Brent* (1836), 1 Curt. 264; *Hogaboom v. The Receiver-General of Canada*, *In re The Central Bank of Canada* (1897), 28 S.C.R. 192; *per Meredith, J.*, in *Re Russell*, 8 O.L.R. 481, at p. 498; R.S.O. 1897, ch. 59, secs. 17 & 18, 36; 53 Vict. ch. 17 (O.); 63 Vict. ch. 17, sec. 18 (O.); Rules of Surrogate Court 19, sub-secs. 1 & 3; *Holmsted & Langton's Ontario Judicature Act*, 3rd ed., at p. 844; that otherwise the petitioner would have had to bring an action in the High Court with the onus on her to prove mistake or fraud. They also referred to *Pew v. Hastings* (1846), 1 Barb. 452; *Burn's Ecclesiastical Law*, 9th ed., vol. 3, p. 311; *Howell's Surrogate Court Act*, 2nd ed., p. 328; *MacLennan's Surrogate Court Practice*, 3rd ed., p. 499.

*Shepley*, for the respondents, referred to *Re Williams* (1896), 27 O.R. 405; 57 Vict. ch. 22, sec. 1 (O.); 58 Vict. ch. 13, sec. 30 (O.); 59 Vict. ch. 20, sec. 5 (O.); 2 Edw. VII. ch. 12, sec. 11 (O.); 5 Edw. VII. ch. 14 (O.).

*Hodgins*, in reply, referred to *Grant v. Great Western R.W. Co.* (1858), 7 C.P. 438; *Watkins v. Brent* (1835), 1 M. & Cr. 97; *Gibson*

D. C.

1906

IN RE  
WILSON  
AND  
TORONTO  
GENERAL  
TRUSTS  
CORPOR-  
ATION.

D. C.

1906

IN RE  
WILSON  
AND  
TORONTO  
GENERAL  
TRUSTS  
CORPORATION.

Meredith, C.J.

v. *Gardner* (1906), 7 O.W.R. 474; Burn's Ecclesiastical Law, 9th ed., vol. 4, p. 437; Con. Rule 642 and cases noted in Holmsted & Langton's Ontario Judicature Act, under that Rule.

November 26. The judgment of the Court was delivered by MEREDITH, C.J.:—The respondents, as successors of the Trusts Corporation of Ontario, are the executors of the last will and testament of the late Sir Adam Wilson, deceased, which bears date June 22nd, 1891, and letters probate of the will were granted to the corporation on February 15th, 1892.

An application having been made to the surrogate Judge of the county of York by the executors for the auditing and passing of their accounts and for fixing the compensation to be allowed them for their care, pains and trouble and time expended in or about the estate, and the surrogate Judge having audited and passed the accounts and fixed the compensation to the executors in the presence of counsel for the appellant, on January 3rd, 1905, an order was made by which it was found: (1) that the total amount which had come into the hands of the executors down to and including June 30th, 1903, was the sum of \$95,890.34. (2) that the total amount of the revenue from the estate which had come to the hands of the executors to the same date was the sum of \$42,630.43. (3) that the executors had properly paid out and disbursed to the same date out of revenue \$21,189.63, and out of capital \$86,329.93 in due course of administration, and that the balance in their hands on the same date was the sum of \$31,001.21. (4) That down to the same date the executors had made investments out of capital on mortgages on real estate and stock, and that on the same date there was outstanding on these investments the sum of \$24,306.67. (5) That the assets of the estate on June 30th, 1903, were those set out in a schedule to the order, marked "A."

The compensation to the executors was fixed by the order at \$6,890, which sum, together with the costs of auditing and passing the accounts and fixing the compensation, was directed to be allowed and paid out of capital, and after deducting these amounts, the amount remaining in the hands of the executors was found to be \$23,952.41.

On February 7th, 1906, the appellant presented to the Judge of the surrogate court of the county of York her petition, in which she alleged that she had recently for the first time been informed "that an item of \$1,200 was charged against the trust estate in" these "accounts as of the 14th day of August, 1897, for the purchase of stock in the Scramble Gold Mining Company"; that she had had no knowledge of the purchase and never authorized it; that the stock is of no value; that no certificate for the stock is held by the executors, and that the register of the company shews that no stock was ever issued to the estate of the testator or to her; and that this sum of \$1,200 was debited against the estate by the executors in fraud of the estate and of the petitioner.

It was further alleged in the petition that the executors had used money of the estate and loaned it and received interest on it to a much larger amount than they had credited the estate with, and had made a profit out of their trust which the estate had not received or been credited with; that the executors had from time to time charged the estate with interest on overdrawn balances at a much higher rate than that at which they had obtained the money, and had taken to their own use and benefit the difference between the lower and the higher rate of interest; that in the inventory there appeared an item shewing as an asset a mortgage from one J. Thompson for \$1,000 which did not appear to be accounted for in the accounts filed in the surrogate court; that among the assets of the estate which came to the hands of the executors was a mortgage from one Brock for \$37,400 covering about 210 lots; that nearly all the lots, including all the best locations, had been sold by the executors, and yet that the indebtedness on the mortgage still stood at \$40,000; that the executors, without consulting the petitioner, had sold a residence and lands belonging to the estate worth upwards of \$10,000 for \$5,000; that the estate had been grossly mismanaged by the executors, and that this mismanagement "should have been taken into consideration had the attention of the Court been directed thereto when fixing the compensation;" that the executors had received monies by way of commission or rebates from insurance and estate agents and had kept them for their own use; that large and excessive sums were spent by the executors in unnecessary and expensive litigation unauthorized by the petitioner, and that these sums had been

D. C.

1906

IN RE  
WILSON  
AND  
TORONTO  
GENERAL  
TRUSTS  
CORPOR-  
ATION.

Meredith, C.J.



D. C.

1906

IN RE  
WILSON  
AND  
TORONTO  
GENERAL  
TRUSTS  
CORPOR-  
ATION.

Meredith, C.J.

charged to the estate; that the petitioner was not notified of the proceedings before the surrogate Judge, and was not present or represented thereat; that the solicitor for the executors wrongfully claimed to represent her.

The prayer of the petition is that the order of January 5th, 1905, should be set aside and vacated, and the accounts re-opened and further investigated by the surrogate court without reference to the order.

After a protracted and expensive inquiry before the surrogate Judge, he made an order bearing date June 11th, 1906, giving liberty to the appellant upon the next passing of the accounts of the respondents to charge them with \$48.87, "being the sum of \$30 in respect of the purchase of Scramble Gold Mining Company stock," with interest thereon, and \$32 for commissions or rebates received by the respondents in respect of insurance on properties belonging to the estate, with \$8 for interest on that sum, and dismissed the petition with costs to be taxed as between solicitor and client and paid by the appellant to the respondents.

From that order the petitioner appeals.

Upon the opening of the appeal it was objected that there was no jurisdiction in the surrogate Judge to vacate his order of January 5th, 1905, or to re-open the accounts, and the argument was confined to that single point, the argument upon the merits being postponed until that point should be determined.

The jurisdiction of the surrogate court was rested by counsel for the appellant upon two propositions: (1) that there is inherent jurisdiction in every Court to vacate an order which has been made by mistake or has been procured by the fraud of the party who has obtained it; (2) that Consolidated Rule 642 applies to the surrogate court and gives the jurisdiction to the surrogate court, if it has not inherent jurisdiction.

Dealing first with the second proposition, I am of opinion that Consolidated Rule 642 cannot be invoked to support the jurisdiction of the surrogate court.

The purpose and effect of the rule are made more clear when the source and history of it are considered.

The rule is taken from Order 330 of the General Orders of the Court of Chancery of 1868, and that order was substantially a re-enactment of secs. 17 and 18 of Order 9 of the General Orders

of 1853. By this latter order bills of review, bills in the nature of bills of review, bills to impeach decrees on the ground of fraud, bills to suspend the operation of decrees, and bills to carry decrees into operation, were abolished; and for the bill of review was substituted a re-hearing of the cause, and for the other bills the proceeding by petition which is now provided for by Consolidated Rule 642.

The Consolidated Rule must, I think, be treated as substituting the proceeding by petition for the practice of filing such bills as were abolished by the General Order of 1853, and must therefore be confined to cases in which under the former practice such relief as is mentioned in the Consolidated Rule could have been obtained by one or other of such bills.

So interpreting the Consolidated Rule, it can have no application to such a case as that to which the appellant seeks to apply it,—the setting aside of an order of the surrogate court made on passing the accounts of an executor.

There are other difficulties in the way of supporting the jurisdiction of the surrogate Judge on the provisions of the Consolidated Rule, but in the view I have taken on the other ground relied on to support the jurisdiction, it is unnecessary to deal with them.

I am, however, of opinion that the surrogate Judge acting as the surrogate court has inherent jurisdiction to set aside an order which he has been induced to make by the fraud of the party who has obtained it, and also to set aside or vary an order which he has made by mistake, though not, however, to correct errors which he has made in the judicial determination of any question upon which he has actually passed.

That “the surrogate courts of the Province are invested with the authority and jurisdiction over executors and administrators and the rendering by them of inventories and accounts conferred in England on the Ordinary under 21 Henry VIII. ch. 5, except in so far as the same may have been revoked by subsequent legislation or rules,” was held by the Court of Appeal in *Cunnington v. Cunningham*, 2 O.L.R. 511, at p. 518, and by a Divisional Court in *Re Russell*, 8 O.L.R. 481-2.

It is open to question whether this authority and jurisdiction was derived from the statute of Henry and was not possessed and exercised by the ecclesiastical courts in England long before that enactment—see *Telford v. Morrison* (1624), 2 Addams, 319; but

D.C.

1906

IN RE  
WILSON  
AND  
TORONTO  
GENERAL  
TRUSTS  
CORPORATION.

Meredith, C.J.

D. C.

1906

IN RE  
WILSON  
AND  
TORONTO  
GENERAL  
TRUSTS  
CORPORATION.

Meredith, C.J.

however that may be, the result is the same as to the extent of the authority and jurisdiction possessed by the surrogate courts of this Province.

No question such as arose in *In re Russell* was presented on the passing of the accounts of the respondents, for no attempt was then or is now made by the appellant to charge the respondents with assets that were not included in the inventory brought into the surrogate court by them, the contest being as to the administration of assets which are admitted by the respondents to have come to their hands.

It is, I think, clear therefore that the surrogate Judge had jurisdiction in dealing with the accounts brought in by the respondents, to inquire into and determine all of the matters and questions which are dealt with in the appellant's petition to re-open the accounts, had they been raised before him at that time.

It is also, I think, clear that the acts of the surrogate Judge in passing the accounts were those of the Court and not of the Judge as *persona designata*.

In *Cunnington v. Cunningham*, in *In re Russell*, and in *In re Williams*, 27 O.R. 405, they were so treated.

The accounts to be dealt with are spoken of in sec. 72 of the Surrogate Courts Act as accounts filed in the surrogate court, and the approval of the Judge referred to in the section must mean, I think, the approval of the Judge sitting as the Court—that is, of the Court.

Having arrived at these conclusions, the question to be determined as to the jurisdiction of the surrogate court to open the accounts approved by it is much simplified.

That the surrogate courts are not statutory courts having only those powers which are in terms conferred upon them by the Surrogate Courts Act follows, I think, from the decision of the Court of Common Pleas in the case of *Grant v. Great Western R.W. Co.* (1858), 7 C.P. 438, and that of the Court of Appeal in *Cunnington v. Cunningham*.

In the former of these cases (7 C.P. at p. 445) it was held that the Legislature intended by the Surrogate Courts Act of 1793, 33 Geo. III. ch. 8, "that the law of England relative to the grant of probate, and the committing of letters of administration, should be the law administered in the courts created by the Act of 1793,



with the same process, pleadings and practice, unless where our statutes express to the contrary, as were in use in the ecclesiastical courts in England in relation to probates and letters of administration;" and in the latter case, as already pointed out, it was held (2 O.L.R. at p. 518) that "the surrogate courts of the Province are invested with the authority and jurisdiction over executors and administrators and the rendering by them of inventories and accounts conferred in England on the Ordinary under 21 Henry VIII. ch. 5, except in so far as the same may have been revoked by subsequent legislation or rules"—authority and jurisdiction which are not in terms conferred upon the surrogate courts by Provincial legislation.

Having reached this conclusion, there remains to be considered the question whether the ecclesiastical courts had jurisdiction and authority to grant such relief as was sought by the appellant in the surrogate court.

In the old case of *Harrison v. Mitchell* (1732), Fitzgibbons, 303, on an application to the Court of Queen's Bench to prohibit proceedings on an application to an ecclesiastical court to repeal on the ground of surprise and fraud letters of administration which had been granted by that Court, the Chief Justice in refusing the writ said, at p. 304: "There was not one case where the suit in the spiritual court for a repeal of an administration either granted irregularly, or obtained by fraud and surprise, was prohibited; and that it would be monstrous that any Court of justice should not have a power to set aside any judgment, or other act obtained from them by deceit and imposition . . . and therefore whether there was a fraud and surprise, or not, was proper to be examined in the spiritual court."

An elaborate investigation of the powers of the prerogative court and the diocesan courts in England was made by Mr. Justice Daly in *Bricks Estate* (1862), 15 Abbott's Prac. 12.

On pp. 35 and 36 of the report, that learned Judge cites a large number of cases in support of his statement that though these Courts "were not courts of record and never had the broad general powers to review and correct their proceedings possessed by courts of that high character, still, as indispensable to the administration of justice, they had and exercised, . . . to a certain limited

D. C.

1906

IN RE  
WILSON  
AND  
TORONTO  
GENERAL  
TRUSTS  
CORPOR-  
ATION.

Meredith, C.J.



D. C.  
1906

IN RE  
WILSON  
AND  
TORONTO  
GENERAL  
TRUSTS  
CORPOR-  
ATION.

Meredith, C.J.

extent, the right of revoking acts done by them, as where a decree is obtained by collusion or fraud."

On p. 36 he says: "I have pointed out, so far as it is shewn by the authority of adjudged cases, the extent to which these Courts have exercised this limited power, and the whole may be summed up briefly in the statement that they may undo what has been done through fraud or upon the supposition that they had jurisdiction . . . or correct mistakes, the result of oversight or accident, . . . These are all powers existing of necessity and indispensable to the administration of justice, under which may be embraced any other exercise of jurisdiction of a like nature or character."

These conclusions of the learned Judge are fully supported by the adjudged cases to which he refers.

In an earlier New York case, *Sipperly v. Baucus* (1861), 24 N.Y. 46, it was held by the Court of Appeals that (p. 49) "as a question of incidental power the surrogate was fully authorized to open the decree" that had been made in that case, upon the passing of the final account of the administrators for error in the accounting, the accounting not being made final and conclusive by any statute."

Though this was a New York case, the jurisdiction which the surrogate was declared to possess was one not derived from any statute, but adjudged to be inherent in the Court.

It is further to be observed that the surrogate courts of this Province are courts of record: R.S.O. 1897, ch. 59, sec. 3; and therefore possess the broad general powers to review and correct their proceedings spoken of by Mr. Justice Daly as being possessed by courts of record, which is an additional reason for holding that the surrogate courts are possessed of the authority and jurisdiction which I would attribute to them.

The preliminary objection must therefore, in my opinion, be over-ruled; but I must not be understood as determining that all or any of the matters referred to in the petition disclose a case for the exercise by the surrogate court of the authority and jurisdiction which in my opinion were vested in it.

I refer also to *Gibson v. Gardner* (1906), 7 O.W.R. 474, 8 O.W.R. 526; and to *Prudam v. Phillips*, referred to in a note to the *Duchess of Kingston's Case* (1776), 20 Howard's State Trials, 355, at p. 479.

A. H. F. L.

## [DIVISIONAL COURT.]

BOOTH V. CANADIAN PACIFIC R.W. Co.

*County Courts—Right of Appeal From—Jury—Order of County Court in Term—County Courts Act, sec. 51.*

D.C.

1906

Dec. 17.

Under sec. 51 of the County Courts Act, R.S.O. 1897, ch. 55, where there has been a trial by a jury of an action in a county court, and a motion has been made to the county court in term for a new trial, and dismissed, no appeal lies from the dismissing order to a Divisional Court of the High Court; but, *semble*, where the findings of the jury are reversed in term, an appeal lies.

MOTION by the plaintiff for an order quashing the defendants' appeal from the order of the Judge of the county court of Carleton, in term, dismissing a motion by the defendants for a new trial, after a trial (the second) by a jury, which resulted in a verdict for the plaintiff, in an action in that county court brought to recover damages for negligence.

The motion was heard by a Divisional Court composed of MULOCK, C.J. Ex. D., ANGLIN and CLUTE, JJ., on the 14th November, 1906.

*W. E. Middleton*, for the plaintiff, contended that the defendants had exhausted their remedy by applying to the county court in term for a new trial, referring to the provisions of sec. 51\* of the County Courts Act, R.S.O. 1897, ch. 55, and to *Leishman v. Garland* (1902), 3 O.L.R. 241; *Irvine v. Sparks* (1900), 31 O.R. 603.

\* 51.—(1) Any party to a cause or matter in a county court may appeal to a Divisional Court of the High Court of Justice from any judgment directed by a Judge of the county court to be entered at or after the trial in any case tried without a jury, and also in any case tried with a jury, to which sub-section 4 does not apply.

(2) Instead of appealing to a Divisional Court of the High Court of Justice any party may move before the county court within the first two days of its next quarterly sittings to set aside the judgment and enter any other judgment upon any ground.

(3) A motion for a new trial on the ground of discovery of new evidence or the like shall be made before the county court.

(4) Where there has been a trial with a jury, any motion for a new trial, whether made for that relief alone or combined with, or as an alternative for any other relief, shall be made to the county court.

(5) If a party moves before a county court under sub-section 2 in a case in which he might have appealed to the High Court he shall not be entitled to appeal from the judgment of the county court to the High Court, but the opposite party shall be entitled to appeal therefrom to the High Court.

D. C.

1906

BOOTH

v.

CANADIAN

PACIFIC

R.W. CO.

Clute, J.

*D'Arcy Scott*, for the defendants, relied upon *Donaldson v. Wherry* (1898), 29 O.R. 552, and upon the decision of a Divisional Court in this case upon an appeal from an order directing a new trial after the first trial of the action.

*Middlton*, in reply, cited *Brown v. Carpenter* (1896), 27 O.R. 412.

December 17. The judgment of the Court was delivered by CLUTE, J.:—This is a motion on behalf of the plaintiff for an order quashing this appeal, upon the ground that the action was tried by a jury, and a motion was made by the defendants to the county court Judge in term for a new trial, which was dismissed, and that no further appeal will lie on the part of the defendants.

The County Courts Act, R.S.O. 1897, ch. 55, sec. 51, governs appeals to a Divisional Court. Sub-section 4 provides that where there has been a trial with a jury, any motion for a new trial shall be made to the county court.

This case was tried by a jury.

If the plaintiff is entitled to succeed in this motion, the effect is that in a case of this kind no appeal can be had to a Divisional Court, and the question is whether the intention of the Legislature was to limit an appeal, in a case of this kind, to the county court.

Sub-section 1 provides that any party to a cause or matter in a county court may appeal to a Divisional Court of the High Court of Justice from any judgment directed by a Judge of the county court to be entered at or after the trial in any case tried without a jury, and also in any case tried with a jury, to which sub-sec. 4 does not apply. This sub-section would seem to contemplate a certain class of cases, to be tried with a jury, in which there is an appeal to the Divisional Court.

In *Donaldson v. Wherry*, 29 O.R. 552, the jury found in favour of the defendant, and judgment was entered in his favour, and upon motion to set aside the verdict and judgment and to enter judgment for the plaintiff or for a new trial, the county court Judge in term made an order setting aside the verdict and judgment and ordering judgment to be entered for the plaintiff. It was held that an appeal by the defendant from the order of the county court Judge in term lay to a Divisional Court. Street, J., points out that the right of appeal under sub-sec. 1 to a Divisional Court in that case was not taken away by sub-sec. 4, because it was not an application for a new trial.

In *Irvine v. Sparks*, 31 O.R. 603, it was held that an appeal did not lie from a judgment of the county court setting aside a verdict and ordering a new trial, the appeal having been taken under sub-sec. 4.

*Leishman v. Garland*, 3 O.L.R. 241, was an appeal by the plaintiff to a Divisional Court from the judgment of the senior Judge of the county court in term setting aside the judgment of the junior Judge of the same court in favour of the appellant at a trial without a jury. It was there held that the motion was properly made under sub-sec. 2, and not under sub-sec. 4, and none the less so, because, in the alternative, a new trial was moved for; sub-sec. 5 providing that if a party moves before a county court under sub-sec. 2, in a case in which he might have appealed to the High Court, he shall not be entitled to appeal from the judgment of the county court to the High Court, but the opposite party shall be entitled to appeal therefrom to the High Court.

It was strongly urged by Mr. Scott that the judgment\* on the previous appeal in this case from the county court was decisive of the present motion, and that the appeal should be heard.

At the first trial of this action before Judge MacTavish, senior Judge of the county court of Carleton, and a jury, judgment was given for the plaintiff on the answers of the jury. An application was then made in term for a new trial or for judgment for the defendant, and judgment was thereupon given in favour of the defendant. From this judgment the plaintiff appealed to a Divisional Court, and objection was taken to the motion being heard, on the ground that the Court had no jurisdiction to entertain the appeal, and *Leishman v. Garland* was cited in support of the objection. The Court, however, held that such an appeal lay. It will be seen that the facts on that application were the reverse of the present. The judgment entered on findings of the jury having been reversed in term, the Court held that an appeal lay. After the second trial the county court in term confirmed the decision of the jury.

The present case having been heard by a jury, and the judgment entered at the trial upon the findings of the jury having been confirmed in term by the county court, I think there is no appeal in such a case to a Divisional Court, and the present appeal should be quashed.

\* Not reported.

D. C.  
1906  
Booth  
v.  
CANADIAN  
PACIFIC  
R.W.Co.  
Clute, J.



[MAGEE, J.]

1906

RYAN V. PATRIARCHE.

Dec. 11.

*Arbitration and Award—Submission—Time for Award—Failure of Arbitrators to Extend—Action—Defence of Arbitration Pending—Stay of Proceedings.*

A submission to arbitration, dated the 4th October, 1904, was under seal, and bound the parties to abide by the award so as it was made on or before the 30th October, 1904, or any subsequent day to which the arbitrators should by writing extend the time. There was no covenant not to take other proceedings. The arbitrators proceeded to consider the matters referred to them and continued the arbitration, with the assent of the parties, for nearly two years, but did not by writing extend the time for the award. The plaintiff brought this action for an account in respect of the matters referred, the arbitration being still uncompleted, and the defendant pleaded the submission and proceedings of the arbitrators as an answer to the action:—

*Held*, that the assent of the parties to the arbitration being proceeded with after the time had expired was equivalent to a parol submission only; sec. 3 of the Arbitration Act, which makes submissions of the same effect as an order of the Court, and irrevocable without leave of the Court, applies, by virtue of sec. 2, to submissions in writing only; the same is the case with sec. 6, which allows an application to stay proceedings; no order extending the time had been made under sec. 10; and therefore the arbitration proceedings afforded no answer.

ACTION by Peter Ryan against P. H. Patriarche for an account of moneys received by the defendant under a contract for the construction and installation of an electric light plant for the town of Orillia, in which the plaintiff alleged that he had an interest under certain agreements with the defendant.

The defendant set up certain arbitration proceedings as an answer to the action.

The facts appear in the judgment.

The action was tried before MAGEE, J., without a jury, on the 29th November, 1906, at Toronto, the trial having been adjourned from Barrie.

*R. D. Gunn, K.C.*, for the plaintiff.

*J. M. Ferguson*, for the defendant.

December 11. MAGEE, J.:—It is conceded that this would be a proper action in which to direct a reference, were it not for the arbitration proceedings. The submission was dated the 4th October, 1904, and was under seal, and bound the parties to abide by the award so as it was made on or before the 30th October, 1904,

or any subsequent day to which the arbitrators should by writing extend the time. There was no covenant not to take other proceedings. The two arbitrators named appointed a third, but found that they could not complete the matter by the 30th October, and each of them so wrote to the party who had nominated him, but said they would proceed with the arbitration. They did not, however, by writing extend the time for the award. They found the accounts involved, and evidence and vouchers needed, the production of which caused delay, and they had to adjourn from time to time, and had some forty or fifty meetings, each of the two original arbitrators obtaining from time to time from his nominator explanations, proofs, and vouchers, as items came up. The plaintiff appears to have protested from time to time to his arbitrator against the delay and against going on. He did not, nor did any counsel, solicitor, or agent for him, attend any of the meetings—nor does it appear that the defendant did. The arbitrators seem to have been left to themselves in trying to arrive at the facts and conclusions. Finally, about May or June, 1906, the plaintiff positively instructed his arbitrator not to proceed further, and in consequence that gentleman so informed his colleagues, and himself declined to go on, and nothing more was done excepting meeting once as to some items which were then being dealt with. They had done about three-fourths of the work referred to them, but it would still require several months before it could be completed in the ordinary course, and the items and matters yet to be considered are of a more contentious character than those which they have already had before them. It is urged for the plaintiff that they can be more effectively dealt with by an officer of the Court, and such is the opinion even of the defendant's arbitrator.

For the defendant it is pressed that the arbitration should proceed; that the plaintiff has been cognizant of and assenting to, and even aiding in, the work done, and expense has been incurred which should not now be rendered useless.

The question comes up by way of defence at the trial.

Assuming that the plaintiff's course amounted to an assent to the arbitration being proceeded with, it would be only a parol submission: *Ruthven v. Rossin* (1860), 8 Gr. 370; *Hull v. Alway* (1836), 4 O.S. 375. And being so, it could not have been made a rule of Court under 9 & 10 Wm. III. ch. 15, nor could an application

Magee, J.

1906

RYAN

v.

PATRIARCHE.

Magee, J.  
1906  
RYAN  
v.  
PATRIARCHE.

for a stay of proceedings have been made under the Common Law Procedure Act of 1856, sec. 91. Section 3 of the Arbitration Act, R.S.O. 1897, ch. 62, which makes submissions of the same effect as an order of the Court, and irrevocable without leave of the Court, only applies, by virtue of sec. 2, to submissions in writing (as to the meaning of which see *Baker v. Yorkshire Fire and Life Assurance Co.*, [1892] 1 Q.B. 144, and *Gillett v. Thornton* (1875), L.R. 19 Eq. 599.) And the same is the case with sec. 6, which allows an application to stay proceedings.

It may be argued that, inasmuch as the law (sec. 10 of the Arbitration Act) attaches to every submission in writing the liability to be extended by the Court, therefore it is always an existing submission in writing though the time has passed. I am, however, dealing with matters as I now find them, without any certainty that any extension would ever be granted. In *Cooke v. Cooke* (1867), L.R. 4 Eq. 77, practically the same state of affairs existed at the commencement of the action as here, but after action the submission was made a rule of Court and an order obtained extending the time for the award, and thus reinstating the submission. It was held that it afforded no answer to the action. I must hold that no answer exists in this case.

Both parties to the action reside in Toronto, and so does the defendant's solicitor. The plaintiff's solicitor resides in Orillia, but it is admitted that no evidence will be required from there. As the parties have not otherwise agreed, the reference should be to the Master here to take the accounts, further directions and costs being reserved.

If the parties desire to avail themselves to any extent of the labour or conclusions of the arbitrators so far as they have gone, a clause to that effect may by consent be embodied in the judgment.

E. B. B.

## [IN THE COURT OF APPEAL.]

LESLIE V. CORPORATION OF TOWNSHIP OF MALAHIDE.

C.A.

1906

Nov. 3.

*Estoppel—Accounts of Municipal Treasurer—Recovery from Municipality of Moneys Paid by Treasurer Out of His Own Pocket—Statement of Account—Audit—Laches.*

In February, 1899, the defendants appointed the plaintiff treasurer *pro tem.* and gave him an order expressed to be on "the treasurer of the township of Malahide," for \$5,799.52, balance in hand of the previous treasurer at the time of his death. The plaintiff carried forward this balance in his cash book, though he had not in fact received the money, and went on honouring orders upon him drawn by the defendants, and his statement of receipts and expenditures for the year 1899 was prepared and audited as if there had been no change in the treasurership; and although long before the end of 1899 the estate of the deceased treasurer proved to be insolvent, he continued from year to year pursuing the same course, shewing each year balances in favour of the township non-existent except upon the footing of his having actually received the \$5,799.52. During 1899 he proved the debt against the deceased treasurer's estate in the name of the defendants, and received two dividends, and a third in 1901, amounting to \$1,481.56. He did not, however, bring the facts directly to the notice of the council or make any claim against the township until 1905; and the defendants apparently remained in ignorance of the facts until shortly before this action was brought to recover the balance due the plaintiff:—

*Held*, that the plaintiff was entitled to recover, as there had been no direct representation by him that the original order given him by the defendants had been paid, and the advances subsequently made by him were all made on orders given by the defendants in respect to the ordinary debts and expenditures of the township; and the defendants had incurred, so far as appeared, no debts or liabilities, and had entered upon no expenditures or undertakings which they would not have done if they had received the clearest notice at the earliest moment, that their late treasurer's estate was insolvent.

*Held*, however, that there must be a reference to the Master to report as to any loss defendants might have sustained by the plaintiff's laches, and the amount for which the plaintiff was entitled to judgment should be reduced accordingly.

THIS was an appeal by the defendants from the judgment of Teetzel, J., pronounced on November 29th, 1905, at the trial of this action on that date, at the non-jury sittings at St. Thomas, whereby he found the plaintiff entitled to recover from the defendants \$4,000 and interest from September 1st, 1899, but without prejudice to any action the defendants might thereafter bring against the plaintiff for damages by reason of anything done or left undone by the plaintiff in connection with proving the claim for the money covered by the order in question in this action against the estate of the late treasurer of the defendants, or in connection with the collection of the said order, and without prejudice to any right the defendants might have for damages against the plaintiff by reason of their rights against the bondsmen of the said



C. A.

1906

LESLIE

v.

TOWNSHIP OF  
MALAHIDE.

late treasurer having been impaired or lost through the act or delay of the plaintiff.

The facts are fully stated in the judgment of this Court.

The appeal was argued on May 4th, 1906, before Moss, C.J.O., and OSLER, GARROW, and MACLAREN, JJ.A.

*W. R. Riddell*, K.C., and *E. A. Miller*, for the defendants, contended that the plaintiff was estopped; that he had not made his claim till it was too late to prove against the estate of the late treasurer; that the onus lay on him to prove the defendants had sustained no damage by the delay, and that if the onus was on the defendants to prove that, when this action was commenced, payment was obtainable from the estate of the deceased treasurer, then there should be a new trial: R.S.O. 1897, ch. 223, secs. 293, 304; *Dickson v. Kinneway*, [1900] 1 Ch. 833, 839; *Knights v. Wiffen* (1870), L.R. 5 Q.B. 660; Biggar's Municipal Manual, pp. 36-9.

*G. C. Gibbons*, K.C., and *W. E. Stevens*, for the plaintiff, contended that the defendants had not shewn themselves to have been prejudiced by what the plaintiff had done; that they had proved nothing which would estop the plaintiff from saying that he did not receive the money from Murray's estate, and that the onus was on them to establish their defence.

*Riddell*, in reply, contended that there was no evidence that the defendants' council thought or had any reason to think that the plaintiff had not received every dollar of the money immediately upon Murray's death; that it was there the estoppel arose; and that the defendants had no intimation to the contrary until 1905.

November 3. The judgment of the Court was delivered by OSLER, J.A.:—The facts of this case disclose a somewhat extraordinary ignorance of business methods on the part both of plaintiff and defendants, and of carelessness in the audit of the treasurer's books. When the defendants, on February 20th, 1899, confirmed the appointment of the plaintiff as treasurer "*pro tem.*" and gave him the order on "the treasurer of the township of Malahide" for \$5,799.52, the balance in the hands of Murray, their former treasurer, it was known to all parties that the treasurer was dead, and therefore that it could only be obtained from his estate in the due course of administration. The order (so to describe it) was probably given and taken as a convenient way, or deemed to be such,

of enabling the plaintiff to obtain payment, as the estate was then supposed to be solvent.

In his accounts with the township the plaintiff has nowhere debited himself with the receipt of the amount of the order after the confirmation of his appointment as treasurer "*pro tem.*" on February 20th (for he was not appointed treasurer until April 8th). He has merely carried forward in the old cash book the balance shewn on a previous page to be in the hands of the former treasurer, making no reference to the order. His statement of receipts and expenditure for the year ending December 31st, 1899, was prepared and audited as if there had been no change in the treasurership, commencing with balance on hand on January 1st of \$6,028.25, and ending with balance to the credit of the township of \$4,228.77. The plaintiff had, however, believing the estate of the deceased treasurer to be solvent and anticipating an early liquidation of the debt due therefrom to the defendants, gone on paying the orders given by them from time to time on the same assumption out of his own moneys, and although long before the end of the year 1899 the estate proved to be insolvent, he continued from year to year thereafter to pursue the same course, rendering his yearly statements of receipts and expenditure, which were duly audited, shewing balances in favour of the township which were non-existent except upon the footing of his having actually received the whole amount of the late treasurer's indebtedness, an assumption which the most casual examination of the cash book by the auditors must have shewn to be unfounded. During the year 1899 he proved the debt against Murray's estate in the name—though, as it is said, without the knowledge—of the council, and received thereon dividends, two in the year 1899, and a third in March, 1901, amounting in all to \$1,481.56, which he credited, though not in the books of the township, against his advances. He did not, however, bring the facts directly to the notice of the council or make any claim against the township until January, 1905. Except the dividends referred to, nothing was recovered from Murray's estate, and unless it may be inferred, as perhaps it ought to be, that the council knew from their clerk, to whom the plaintiff had communicated it, that the order had not been paid and that their claim against Murray's estate had been filed, they remained in ignorance of the fact until shortly before action brought.

C. A.

1906

LESLIE

v.

TOWNSHIP OF  
MALAHIDE.

Osler, J.A.

C. A.

1906

LESLIE

v.

TOWNSHIP OF  
MALAHIDE.

Osler, J. A.

The plaintiff's only explanation is that, having carried forward in the cash book as continued by him to the credit of the township the amount due by Murray, and having rendered his statements of receipts and expenditure for the year 1899, and having allowed this and subsequent statements to be audited as if he had actually received it, he conceived the impression that he had made the debt his own and had lost the money.

The question is whether under these circumstances he is now entitled to recover from the township the moneys so paid by him, and on the whole, subject to the enquiry hereafter directed, I think that he is. The case is not one for the application of the rule as to voluntary payments, and indeed a defence on that ground was but faintly, if at all, pressed. The grounds chiefly relied on were that the plaintiff had agreed to accept the order of February 20th as cash, and to account for it on that footing, or that by his conduct and silence the defendants had lost certain remedies against the estate of their former treasurer and his sureties. It is clear upon the evidence that the first of these grounds of defence is not made out, and that the finding of the learned trial Judge in that respect cannot be disturbed.

There was no understanding or agreement between the parties that the plaintiff should charge himself with the amount of the order, nor is there any apparent reason why he should have done so. The business between the parties therefore began by the payment of orders given upon him by the defendants for the payment of sums which they could have had no reasonable ground for supposing that he had then in his hands. I can see no reason why after the end of his first year of office he could not have recovered for the advances made during that year, notwithstanding the delivery of the statement of receipts and expenditure and their audit, and, in the absence of any direct representation that the order of February had been actually paid, I think the advances during the subsequent years should be treated on the same footing, as they were all made upon orders given from time to time by the defendants in respect of the ordinary debts and expenditures of the township which must have been received and paid in any case. The defendants have had the benefit of these payments, and have incurred, so far as appears, no debts or liabilities, and have entered upon no expenditures or undertakings, which they would not have

incurred or entered upon if they had received the clearest notice at the earliest moment that their late treasurer's estate was insolvent. For these reasons I think the case distinguishable from that class of cases of which *Cave v. Mills* (1862), 7 H. & N. 913, is an example. *London Chartered Bank v. McMillan*, [1892] A.C. 292, may also be referred to.

The defendants have, however, good reason to urge that they may have been prejudiced by the laches of the plaintiff in respect of what might have been recovered from Murray's estate or from his sureties. This was a matter of defence not raised by the pleadings, and though opened at the trial it was manifest that neither party was prepared to deal with it there in a satisfactory manner. The learned Judge therefore, while giving judgment in favour of the plaintiff for the amount of his claim, directed that it should be without prejudice to any action the defendants might afterwards be advised to bring against the plaintiff for damages in respect either of things done or omitted by the plaintiff in proving the claim against Murray's estate, or by reason of their rights against the late treasurer's sureties having been impaired or lost through the act or delay of the plaintiff.

As the case was presented at the trial this was probably the full measure of relief to which the defendants were entitled.

It appears to us, however, that it would be more satisfactory if the rights of all parties in respect of these matters were disposed of in the present action, so that the plaintiff shall have judgment for, if anything, no more than upon the investigation of the claims on both sides, shall appear to be due to him. The amount of the plaintiff's claim, therefore, being taken to be as found at the trial, it is referred to the Master at St. Thomas to make the enquiries mentioned in the 3rd paragraph of the judgment, and to report whether and to what extent any damage or loss has resulted to the defendants in respect of the matters above referred to and in respect of any payment which it may appear the plaintiff has improperly made to representatives of the deceased treasurer; reserving further directions and costs, except the costs of this appeal, which must be costs to the respondent in any event of the cause.

C. A.  
1906  
LESLIE  
v.  
TOWNSHIP OF  
MALAHIDE.  
Osler, J.A.



## [DIVISIONAL COURT.]

D.C.

1906

CLARKE v. UNION STOCK UNDERWRITING CO.

Dec. 4.

*Bills of Exchange—Absence of Consideration—Evidence, Admissibility of—  
New Trial.*

In an action upon two promissory notes for \$3,000 and \$4,000 respectively, the defendants set up want of consideration and that the plaintiff was not a *bond fide* holder for value. At the trial the defendants tendered evidence, which was refused, to shew that the notes were given merely as receipts for stock which had been delivered to defendants for sale as agents, that there was no consideration for the notes, and that the plaintiff, who was a clerk in the office of his solicitors, had given no value therefor; also that a written agreement for the transfer of the stock made between the payee of the note and another, and one of the defendants' firm, had never been acted upon, or had been abandoned:—

*Held*, that whether or not evidence was admissible to shew that the notes were given as receipts, the defendants were entitled to give in evidence all the facts which would tend to establish want of consideration, and this having been denied them, a new trial was directed.

THIS was an appeal from the judgment of Falconbridge, C.J.K.B., in favour of the plaintiff in an action tried at Peterborough on June 14th, 1906.

*G. H. Watson*, K.C., and *S. T. Medd*, for the plaintiff.

*Riddell*, K.C., and *G. Edminson*, K.C., for the defendants.

The action was brought on two promissory notes for \$3,000 and \$4,000, dated 21st August, 1905, and payable respectively two and five months after date, made by the defendants to Archibald Johnston and endorsed by him to the plaintiff.

The defendants, amongst other defences, set up want of consideration.

At the trial the plaintiff put in the notes, and also the evidence for discovery of *E. C. Howson*, one of the defendants, in which it was claimed that he admitted the making of the notes.

It was objected on behalf of the defendants that the admission was only effective as regarded the witness *E. C. Howson*; and further, that the defendants were a non-trading company, and were not empowered to make promissory notes.

These objections were overruled and the defence was entered into.

The defendants put in a written agreement, dated 15th of August, 1905, between Archibald Johnston and James Johnston, executors of William H. Johnston, deceased, of the first part, and the said E. C. Howson of the second part, whereby the parties of the first part "agreed to sell" and the party of the second part "to buy 150 shares of stock in the Roller Bearing Manufacturing Company, subscribed for by the said deceased in his lifetime, on which there has been paid 50 per cent. . . . at and for the sum of \$7,000, to be paid at any time on or before the 15th day of January next, without interest; the party of the second part to pay the call of ten per cent., which has now been made in respect of said stock; and the party of the second part to have the full benefit of and receive the dividend on said stock, which it has been declared will be payable September next."

The defendants desired to put in evidence to shew that the agreement had never been carried out, but was abandoned, and that the arrangement that was come to between the parties was that the defendants should merely act as agents for the disposal of the stock, and that the documents, though in form of notes, were to be treated merely as receipts. The defendants also desired to plead an amended defence setting up these facts.

It was objected for the plaintiff that such evidence was inadmissible, as tending to vary or contradict the written agreement.

The learned Chief Justice refused to admit the evidence and to allow the proposed amended defence, and entered judgment for the plaintiff for \$7,000, the amount of the notes, with interest from their respective due dates, with costs.

From this judgment the defendants appealed to the Divisional Court.

On December 3rd, 1906, the appeal was heard before BOYD, C., MAGEE, and MABEE, JJ.

*H. E. Rose*, for the appellants. The appellants should have been allowed to go into their defence at the trial. They set up a want of consideration, and at the trial an amended defence was also put in shewing the grounds on which the defence was made. Their contention was that the plaintiff had never given any value for the notes; that the defendants were only the agents of the payee and another to sell the stock, and the documents, though in the form of

D. C.  
1906  
CLARKE  
v.  
UNION  
STOCK  
UNDER-  
WRITING  
Co.

D. C.  
1906  
CLARKE  
v.  
UNION  
STOCK  
UNDER-  
WRITING  
Co.

notes, were merely receipts. The case of *Abrey v. Crux* (1875), L.R. 5 C.P. 37 was relied on at the trial; but the case which governs here is *New London Syndicate v. Neal*, [1898] 2 Q.B. 487. Although it was held in that case that a contemporaneous agreement to renew a bill could not be supported, as being an attempt to vary the written agreement, still it is laid down that where the evidence would shew that the document never was a document in the sense contended for it, such evidence is admissible. The authorities all shew that evidence is admissible to establish that a document had been delivered conditionally, i.e., as an escrow, only to be handed over on certain acts being performed, and it is equally clear that the evidence is admissible to shew that the document never was of the character contended for by the plaintiff: The Bills of Exchange Act, 1890, 53 Vict. ch. 33, sec. 21, sub-sec. 2 (D.); Byles on Bills, 16th ed., 116, 182; *Wisner v. Wisner* (1863), 22 U.C.R. 446; *Pym v. Campbell* (1857), 6 E. & B. 370; *Rodgers v. Hadley* (1864), 2 H. & C. 227.

*G. H. Watson*, K.C., and *S. T. Medd*, for the respondent. The learned Chief Justice acted properly in refusing to admit the evidence. The plaintiff proved the notes, and his case was then complete. The defendants then put in the written agreement, and this supported the plaintiff's case. All that the defence amounts to is that the notes were to be paid in a different way or different manner than that stated in the notes themselves. *Abrey v. Crux*, L.R. 5 C.P. 37, is clearly in point. There the defence attempted to be set up was that the acceptor was to deposit certain securities with the plaintiff which were to be sold and applied in liquidation of the bill, and until so sold the defendants were not to be liable for the bill, and this was held to be inadmissible as varying or contradicting the written contract as expressed in the bill. The case of *New London Syndicate v. Neal*, [1898] 2 Q.B. 487, also decides that a contemporaneous agreement to renew a bill could not be supported; but there may be a conditional acceptance, that is, the document may be delivered as an escrow. In *Pym v. Campbell*, 6 E. & B., there was no completed instrument. In *Wisner v. Wisner* it was clearly proved that there was no consideration. The authorities are conclusive that a defence such as is set up here comes within the objection that it is merely an attempt to vary the written document: *Young v. Austen* (1874), L.R. 4 C.P. 553; *Hoare v. Graham*

(1810), 3 Camp. 518; *Fee v. Hawkins* (1815), 8 Taunt. 92; *Tyson v. Abercrombie* (1888), 16 O.R. 98; *Porteous v. Muir* (1884), 8 O.R. 127; *Christopher v. Noxon* (1883), 4 O.R. 672; *McNeeley v. McWilliams* (1886), 13 A.R. 324; Maclaren on "The Bills of Exchange Act, 1890," 33-34, 160. It would be a very serious matter if such a defence was allowed, as tending to destroy or impair the effect of promissory notes.

*H. E. Rose*, in reply. The other side base their argument on the fact of there being a written agreement and of an attempt to vary or contradict it. What the defendants contend for, however, is that there never was any written agreement; that the document was produced by them merely for the purpose of establishing the fact that it had never been carried out.

December 4. The judgment of the Court was delivered by MABEE, J.:—The plaintiff claims recovery from the defendants of the sum of \$7,000, being the amount of two promissory notes for \$3,000 and \$4,000, dated August 21st, 1905, payable to Archibald Johnston or order two and five months respectively after date, and endorsed by him without recourse to the plaintiff. The defendants set up several defences, the effect of which was that they had never received any value for the notes and that the plaintiff was not a *bonâ fide* holder for value. It is clear that the case has not been fully tried out, and the facts connected with the transaction are not before the Court. The case at the trial went off on the pleadings, which in some respects raise matters that probably would form no answer to the plaintiff's claim. The learned Chief Justice of the King's Bench offered to hear all the evidence, notwithstanding the position the pleadings were in, but counsel for the plaintiff insisted that the proposed defences were not open to the defendants, and judgment went for the sum claimed.

Many cases were cited upon this appeal to shew that the terms of a promissory note cannot be contradicted, and the authorities are clear that verbal evidence cannot be given to shew a contemporaneous agreement that the note should not be paid, or should be renewed or the like.

The defendants contended that the notes were delivered as receipts, or as evidence of certain stock in the Henderson Roller Bearing Co. having been transferred to them for sale; that they

D. C.  
1906  
CLARKE  
v.  
UNION  
STOCK  
UNDER-  
WRITING  
Co.



D. C.  
1906  
CLARKE  
v.  
UNION  
STOCK  
UNDER-  
WRITING  
Co.  
Mabee, J.

had never received value for the notes, and that the plaintiff, a clerk in the office of the plaintiff's solicitors, was not a holder for value. It may be that the maker of a note cannot give evidence that the note was given as a receipt, but I think it is open to him to shew that it was given without consideration, and then if he is able to establish that the plaintiff stands in no better position than the payee he makes out his defence.

In the latter part of paragraph 5 of the defence it is alleged that the plaintiff is not the *bonâ fide* holder, and paragraph 6 alleges no value was received by the defendants for the note. Evidence has not yet been given upon either of these defences.

The matter was further confused at the trial by an agreement for sale of the stock in question by the payee and another to E. C. Howson, one of the defendant partnership, and the defendants were denied the opportunity of shewing that the stock had not been in fact transferred under that agreement, or that it had not been acted upon, or had been abandoned. This agreement was prior to the giving of the notes, was not between the parties to this action, and the date of payment mentioned in the agreement is different from the dates of maturity of the notes. I think it was open to the defendants to shew all the facts connected with the transaction in question upon the record as it stood, without any amendment, the issue being simply as above indicated, nor do I think the giving of such evidence would offend against any of the authorities. All the defendants were endeavoring to do was to assert that although they gave the notes yet no stock was transferred to them, or other consideration given therefor; that the alleged agreement was not acted upon or was abandoned. If they could establish this, and couple with it the fact that the plaintiff was really the payee of the note, and suing for him, as they allege in their defence, the result might have been different.

The defendants may not be able to establish any of these things, but they have not yet had the opportunity. The judgment should be set aside and a new trial had.

The defendants may amend if they desire.

The costs of the last trial will be reserved for disposition at the next trial, but the defendants must pay the plaintiff's costs of opposing this appeal.

[IN CHAMBERS.]

1906

Nov. 5

STEPHENS V. TORONTO RAILWAY CO.

*Appeal—Divisional Court—Leave to Appeal to Court of Appeal—Practice—Conflicting Decisions.*

Leave to appeal to the Court of Appeal from the judgment of a Divisional Court granted in a case in which the scale of costs taxable was in question, the point being one of considerable practical importance, and there being differences of opinion in the cases already decided.

THIS was a motion by the defendants for leave to appeal upon a question of practice as to the scale of costs taxable upon taking money out of court paid in with the defence.

The plaintiff, by her writ in the action, for an accident alleged to have arisen through the defendants' negligence, claimed for unstated damages, but which in the statement of claim were stated at \$1,000. The defendants by their statement of defence denied liability; but at the same time paid into Court \$100 as sufficient to answer the plaintiff's claim, if any. This sum the plaintiff accepted in full satisfaction of her claim, and delivered her bill of costs for taxation on the High Court scale. This was objected to by the defendants, who claimed that costs on the county court scale should only be allowed. The taxing officer was of the opinion that the plaintiff was entitled to costs on the High Court scale and taxed same, granting his certificate therefor.

The defendants thereupon appealed to a Judge in Chambers and to a Divisional Court when the ruling of the taxing officer was affirmed, and the appeal dismissed.

The defendants then applied to a Judge of the Court of Appeal for leave to appeal to the Court of Appeal.

On November 5th, 1906, the application was heard before GARROW, J.A.

*D. L. McCarthy*, for the applicants.

*R. H. Parmenter*, contra.

Garrow, J.A.

1906

STEPHENS

v.

TORONTO

R.W. Co.

November 5. GARROW, J.A.:—The point is one of considerable practical importance, and in view of the differences of opinion expressed in the cases of *Chick v. Toronto Electric Light Co.* (1887), 12 P.R. 58, and *Babcock v. Standish* (1900), 19 P.R. 195 (in which apparently the earlier decision was not cited), the leave should be granted. But as the plaintiff acted upon the practice as settled by the case in 19 P.R. 195, I think it is only fair that the leave to appeal should be on condition that the defendants shall pay the plaintiff's costs of this motion and of the appeal to this Court in any event.

G. F. H.

[IN CHAMBERS.]

BURNS V. THE CORPORATION OF THE CITY OF TORONTO.

1906

Dec. 19.

*Jury—Negligence—Non-Repair of Highway.*

Plaintiff's statement of claim, in an action for injuries sustained by falling into an open sewer dug in the street by the defendants, alleged that such injuries "were caused by the negligence of the defendants in not securely guarding said sewer and making same safe for passengers using said street":—

*Held*, that the failure of the defendants to guard the excavation was non-repair within the meaning of sec. 104 of the Judicature Act and a motion to strike out the jury notice was allowed.

THIS was a motion in an action for damages for alleged negligence to strike out a jury notice as irregular, under sec. 104 of the Judicature Act, R.S.O. 1897, ch. 51.

The motion was argued on the 17th of December, 1906, before Mr. Cartwright, Master in Chambers.

*John T. White*, for the motion.

*T. N. Phelan*, contra.

December 19. THE MASTER IN CHAMBERS:—The female plaintiff "fell into an open sewer which had been dug in the street by the defendants."

The statement of claim then proceeds to say that these injuries "were caused by the negligence of the defendants in not securely guarding said sewer and making same safe for passengers using the said street."

It was contended that the failure of defendants to guard the excavation was not non-repair within the meaning of the Act. But in view of the recent decisions in *Armstrong v. Township of Euphemia* (1906), 7 O.W.R. 552, and *Hobin v. City of Ottawa* (1906), 8 O.W.R. 589, I do not think this argument can succeed. Here the plaintiff's claim is based on an omission on the part of the corporation which rendered the highway unsafe for those entitled to use it. Had the excavation been alleged to have been unlawful the matter would have been otherwise.

All the authorities are given in the cases cited.

The motion is granted; costs in the cause.

G. A. B.



## [DIVISIONAL COURT.]

D. C.

1906

Dec. 13.

RE PRESTON.

*Trusts and Trustees—Trustee de son Tort—Infant Cestui que Trust—Illegal Disposition of Fund—Payment into Court—Jurisdiction.*

Moneys payable to a widow as trustee for her infant child were collected for her by M., and by arrangement between them retained by him and employed in his business. By writing addressed to the widow he acknowledged holding the moneys to the credit of the infant, "bearing interest at the rate of six per cent. per annum:"—

*Held*, that M. was a trustee *de son tort*, and as such either an express or a constructive trustee, and liable to account to his infant *cestui que trust*, and so entitled to come to the Court, under the Trustee Relief Act, R.S.O. 1897, ch. 336, sec. 4 (and sec. 2, defining "trustee"), and obtain an order allowing him to pay the moneys into Court, against the opposition of the widow, who pressed for payment to her, on the ground that he was simply her debtor.

*Semble*, also, *per* ANGLIN, J., that the Court had jurisdiction, as custodian of the interests and property of infants, to order, *motu proprio*, that which, upon application of the official guardian or of the infant by her next friend, it could and would direct, by virtue of Rule 938 (*d*); and further, if the widow had resided abroad for a year and was resident abroad when the application for payment in was launched, the order might be made under 62 Vict. ch. 15, sec. 3 (O.)

Order of Mabee, J., affirmed.

An appeal by Mary E. Preston from an order of Mabee, J., in Chambers, directing James Moneyppenny, on his own application, to pay into Court a sum of \$1,019.92 in his hands, to which the infant Lois E. Preston was beneficially entitled.

The following statement of the facts is taken from the judgment of ANGLIN, J.:—

An insurance policy on the life of the deceased father of the infant was, by indorsement, made payable to the appellant, his widow, Mary E. Preston, "for the maintenance and support" of their child Lois. These moneys were collected for Mary E. Preston by James Moneyppenny, her brother-in-law. After they had come to his hands, by arrangement between himself and Mrs. Preston, Moneyppenny retained them and employed them in the business of the firm of Dignum & Moneyppenny, in which he was a partner. He gave to Mrs. Preston the following acknowledgment:—

"Toronto, March 1st, 1905.

"Mrs. D. M. Preston,

"Philadelphia.

"Dear Madam: We beg to advise you that we hold to the credit of Miss Lois Preston's account the sum of nine hundred and

forty-seven dollars and fifty-six cents (\$947.56) bearing interest at the rate of six (6) per cent. per annum payable quarterly.

“Yours truly,

“Dignum & Moneypenny.”

D. C.  
1906  
RE  
PRESTON.

The evidence discloses that the infant is residing not with her mother but with Mr. Moneypenny, by whom she is being supported. After the moneys in question had been in Moneypenny's hands for more than a year, apparently because of some misunderstanding or quarrel between himself and Mrs. Preston, she demanded that he hand these moneys over to her, and pressed her demand. Believing, as he swears, that Mrs. Preston contemplated marrying again, and that if these moneys were given to her they would be diverted from the purposes of the trust to which they were subject, Mr. Moneypenny refused to pay over the moneys to Mrs. Preston, and immediately instructed the application upon which my brother Mabee made the order allowing payment in. Mrs. Preston now appeals on the ground that the Court has not jurisdiction to make such an order. The amount paid in includes the principal sum received by the applicant with interest thereon at 5 per cent. from the date at which he received such principal, less his costs of the application, which were given him by the learned Judge and were fixed at the sum of \$30, and the costs of the appellant fixed at a like sum.

The appeal was heard by a Divisional Court composed of MULLOCK, C.J. Ex.D., ANGLIN and CLUTE, JJ., on the 13th November, 1906.

*W. E. Middleton*, for the appellant. Moneypenny was the appellant's agent, and kept this money for her. She was the trustee. By keeping the money and putting it into his business he simply made himself the debtor of the trustee; in other words, he borrowed the money from the trustee. He was a wrong-doer, as she was. He certainly was not a trustee. The insurance company could have paid the money into Court under sec. 155 of the Insurance Act, R.S.O. 1897, ch. 203. The debtor is not concerned—he simply has to repay the money to the trustee. Moneypenny does not come within sec. 4 (and see sec. 2) of the Trustee Relief Act, R.S.O. 1897, ch. 336, nor within sec. 58, sub-sec. 6, of the Judicature Act. I refer to *Matthew v. Northern Assurance Co.* (1878), 9 Ch.D. 80;

D. C.  
1906  
RE  
PRESTON.

*In re Sutton's Trusts* (1879), 12 Ch.D. 175; *Western Canada Loan and Savings Co. v. Court* (1877), 25 Gr. 151; Taylor's Supreme Court Practice, Appx., p. 138; *Re Bajus* (1894), 24 O.R. 397. There are no conflicting claims here. *Re Humphries* (1898-9), 18 P.R. 289, and *Whitewood v. Whitewood* (1900), 19 P.R. 183, are distinguishable; in each case there was a cause pending in Court.

*W. E. Raney*, for Moneypenny. He is a trustee *de son tort* or a constructive trustee, and is entitled to pay the money in under sec. 4 of the Trustee Relief Act.

*Middleton*, in reply. Mrs. Preston could not make the debtor a trustee. On his own statement he did not receive the money as a trustee.

December 13. ANGLIN, J. (after stating the facts as above):—There can be no doubt that Mr. Moneypenny took these moneys and kept them with full knowledge of the trust to which they were subject, and must be deemed to have been aware that his retention of them pursuant to the arrangement with Mrs. Preston was in breach of trust. It follows that Moneypenny was at least a trustee *de son tort* of these moneys. He was as such accountable to the fullest extent as a trustee for the moneys and for his use of them—accountable not merely as a debtor to Mrs. Preston, but as a trustee to Lois E. Preston, his *cestui que trust*. By the document which he gave to Mrs. Preston he made himself, though otherwise perhaps merely chargeable as a trustee by operation of law, an express trustee of this fund. In the circumstances of this case, this document is a declaration by Moneypenny of an express trust upon which he held the money. His attempt to limit his liability for its use to payment of a fixed rate of interest cannot give him the legal status of a mere debtor.

Being then a trustee—though *de son tort*—and as such liable to account to an infant *cestui que trust*, the applicant, however much at fault, was, I think, entitled to come to the Court, under the Trustee Relief Act, R.S.O. 1897, ch. 336, sec. 4, and sec. 2, defining “trustee,” and ask to pay the money in his hands into Court, thus relieving himself *pro tanto* of his onerous responsibilities as a trustee. The Court, which, in the exercise of its equitable jurisdiction, imposes upon the applicant the burdens and liabilities of a trustee, will not deny to him relief, to which as a trustee the statute would

entitle him. *Quâ* debtor of Mrs. Preston, the applicant had no right to thus discharge his liability; *quâ* trustee he may be entitled to be thus relieved *quoad* his *cestui que trust*, the infant. A trustee by operation of law, because of his knowingly retaining trust moneys, an express trustee, I think, by virtue of his own declaration, Mr. Moneypenny, in my opinion, rightly asked the Court to allow him to discharge himself as permitted by the Trustee Relief Act. Where, as here, it clearly appears to be for the benefit of an infant *cestui que trust* that payment in should be permitted, the Court may, and I think should, pronounce the order—though in other cases, where the interests of the *cestui que trust* seem not to require it, the Court, in the exercise of its discretion, may refuse to entertain such an application, though made by a person whose status as a trustee is indisputable.

But upon another ground entirely, I think the order in appeal may be supported. The Court was apprised—from what source cannot be material—of facts which indicated that money of an infant was, in breach of trust, in the hands of a person who was before the Court. The original trustee, likewise guilty of breach of trust, was also before the Court. The fitness of this trustee to again handle such moneys was seriously in question. A case of jeopardy of infant's money was sufficiently established, had an application been made on behalf of the infant by the official guardian, or by a next friend, to warrant the Court making an order for payment in of the fund. Jurisdiction to make such an order on summary motion by the *cestui que trust* is expressly conferred by Rule 938 (*d*). Mr. Moneypenny, if not entitled, as claimed by the appellant, to the privileges, rights, and remedies of a trustee, is certainly subject to all the powers and jurisdiction which the Court can exercise over trustees for the benefit of *cestuis que trust*. One of these powers is to order payment into Court of any money in the hands of a trustee on motion made on behalf of the *cestui que trust*.

As custodian of the interests and property of infants, the Court, exercising the jurisdiction formerly vested in the Chancellor, must be able, *motu proprio*, to order that which, upon application of the official guardian or of the infant by her next friend, it could and would direct.

In *Huggins v. Law* (1887), 14 A.R. 383, at p. 394, Patterson, J.A., says: "The jurisdiction of the Court in respect of the property

D.C.

1906

RE  
PRESTON.

Anglin, J.



D. C.  
1906  
Re  
PRESTON.  
Anglin, J.

of infants and its power to direct guardians or other trustees in their management of that property, or to take it out of their hands and assume the care and management of it, is not open to dispute. In the exercise of that jurisdiction it may be the general rule of the Court to require that money shall not remain in the hands of the guardian, executor, or other trustee, but shall be paid into Court." He speaks of "the right of the guardian to get in the estate, of whatever it consists, and to manage it until interfered with by the order of the Court."

In *Re Harrison* (1899), 18 P.R. 303, Robertson, J., quotes this language as indicative of the wide powers of the Court in dealing with infants' property and the trustees thereof.

In *Campbell v. Dunn* (1892), 22 O.R. 98, at p. 106, the Chancellor said: "The fund having been brought before the Court by the parties, and there being a contest as to its custody, I will order it to be paid into Court for the protection of the infants."

In *Re Humphries*, 18 P.R. 289, the Chancellor again stated the jurisdiction of the Court in very broad language, and held, on a summary application under Rule 938 against a trustee, though not made by the infant *cestui que trust*, that an order for payment in should be made.

These cases indicate the scope of the jurisdiction which the Court exercises for the protection of the property of infants.

If the order in appeal were vacated, and Mrs. Preston were allowed to bring an action to recover this money from Mr. Money-penny, the moment she should commence such action, an order for payment into Court would be pronounced on the application of either party, or on that of the official guardian intervening for the infant, such facts being shewn as are now admitted by both parties, though the solvency, the conduct, and the character of Mrs. Preston were subject to no imputation: *Whitewood v. Whitewood*, 19 P.R. 183.

If there were any doubt of our jurisdiction, it would, I think, be our plain duty, before disposing of the present appeal, to direct the official guardian to intervene and to make a substantive application on behalf of the infant for the retention of these moneys in Court. But, having no doubt of the jurisdiction under which the order of my brother Mabee was made, I see no reason for putting the infant's small estate to the expense of another motion.

The application for payment in was made to relieve a situation arising entirely from the breach of trust in which the applicant as well as Mrs. Preston participated. Having created the difficulty, he should not, I think, have been allowed to remove it at the expense of the infant. I would, therefore, vary the order in appeal by striking out the allowances to the applicant and to Mrs. Preston of the sum of \$30 each for costs. Of the present appeal, in view of this variation, there should be no costs.

Though the material does not shew it, there is in the acknowledgment of Mr. Moneypenny, quoted above, an indication that Mrs. Preston was, in March, 1905, a resident of Philadelphia, Pennsylvania. If her residence there lasted for the period of a year, and continued until this application was launched, the order might also be supported under 62 Vict. ch. 15, sec. 3 (O.)

CLUTE, J.:—I agree in the result arrived at by my brother Anglin, upon the ground that the respondent, under the facts and circumstances in this case, became a constructive trustee within sec. 2 of the Trustee Relief Act.

"It is well established by many decisions, that a mere agent of trustees is answerable only to his principal and not to *cestuis que trust* in respect of trust moneys coming to his hands merely in his character of agent. But it is also not less clearly established that a person who receives into his hands trust moneys, and who deals with them in a manner inconsistent with the performance of trusts of which he is cognizant, is personally liable for the consequences which may ensue upon his so dealing": *Lee v. Sankey* (1872), L.R. 15 Eq. 204, 211.

It is said that "if a person owe money to a testator's estate, and be apprised that the executor means to misapply it, he cannot safely hand it over": Lewin on Trusts, 11th ed., p. 558. But mere apprehension of a breach of trust does not justify a refusal to pay to a trustee: *ib.*, pp. 560-1.

"If a person has assumed to act as trustee, and having received money in that character misapplies it, he is accountable for the proceeds to the *cestui que trust*, and cannot defend himself by shewing that in fact he was not legally a trustee": *ib.*, p. 1140.

"An express trust," it is said, "can only arise between the *cestui que trust* and his trustee. A constructive trust is one which

D. C.  
1906  
RE  
PRESTON.  
Anglin, J.

D. C.  
1906  
—  
RE  
PRESTON.  
—  
Clute, J.

arises when a stranger to a trust already constituted is held by the Court to be bound in good faith and in conscience by the trust in consequence of his conduct and behaviour. Such conduct and behaviour the Court construes as involving him in the duties and responsibilities of a trustee, although but for such conduct and behaviour he would be a stranger to the trust. A constructive trust is therefore, as has been said, 'a trust to be made out by circumstances': *Soar v. Ashwell*, [1893] 2 Q.B. 390, at p. 396; see also pp. 402, 403, 405.

In *Wilson v. Moore* (1834), 1 My. & K. 337, merchants applied trust moneys in discharge of a private debt, and Brougham, L.C., held, affirming the judgment of Sir John Leach, that having concurred in this breach of trust they must be held to be trustees.

In *Life Association of Scotland v. Siddal* (1861), 3 D.F. & J. 58, a person who was not actually trustee of a will assumed to act and acted as though she were a trustee, and she was held to be in the position of an express trustee. Turner, L.J., said (p. 72): "If she had by writing declared herself to be a trustee, the trust in her could not have been otherwise than express, and her conduct is equivalent to her written declaration."

*Burdick v. Garrick* (1870), L.R. 5 Ch. 233, and cases therein referred to, recognize that express trusts of personal property may be created either verbally or by conduct only. In that case it was held that agents intrusted with funds under power of attorney were in a fiduciary position. Lord Hatherley, L.C., said: "How a person who is intrusted with funds under such circumstances differs from one in an ordinary fiduciary position I am unable to see."

I do not think that it would be going too far to hold that the receipt given in this case created an express trust, but, at the least, having regard to the facts and circumstances, there was, in my opinion, a constructive trust created which is sufficient to bring the case within the purview of the Trustee Relief Act.

Upon the other ground upon which my brother Anglin's judgment proceeds, I desire to express no opinion. No case was cited, nor have I been able to find any case, in which the Court has recognized proceedings other than an action or application authorized by statute or rule of Court whereby to bring the estate of an infant under the control of the Court. Doubtless the Court may direct

proceedings to be taken on behalf of the infant for payment in. The right to apply to the Court, except in actions pending, has, so far as I am aware, been limited to those cases expressly authorized by statute or rule of Court.

Rule 938 (d) authorizes an originating notice for the payment into Court of any money in the hands of executors or trustees. This Rule has, I think, no application except in the class of cases there specified. I prefer, therefore, to rest my judgment upon the ground that the present application is within the Trustee Relief Act.

As to costs, I think the order should be varied as directed by the judgment of my brother Anglin.

MULOCK, C.J.:—I agree in the conclusion of my brothers Anglin and Clute that this appeal should be dismissed, and propose to refer only to the argument of Mr. Middleton that the dealings between Mr. Money Penny and Mrs. Preston created a legal contract whereby he was bound to repay the money to Mrs. Preston, and that the matters in controversy cannot be treated otherwise than as arising out of such contract.

Mrs. Preston was trustee of the fund for her infant child, and intrusted it to Mr. Money Penny to invest in a mercantile business. Such an investment of this trust fund was a breach of trust. Mr. Money Penny when accepting the money knew it was a trust fund, and whilst he was, I have no doubt, innocent of any intentional wrongdoing, nevertheless his action in investing the fund in a mercantile business made him also guilty of breach of trust. So that the transaction resolves itself into this, that the subject matter of the alleged contract is a trust fund, and one of its terms is that this fund shall be illegally invested.

It was not competent for the parties to control the rights of the *cestui que trust* in respect of the fund by such a contract, which, involving a breach of trust, is fraudulent and void as against the *cestui que trust*, and therefore cannot stand as a bar to the Court's exercising its equitable jurisdiction in respect of the trust fund in question.

D. C.  
1906  
RE  
PRESTON.  
Clute, J.



## [DIVISIONAL COURT.]

D. C.

1906

SMITH v. MCINTOSH.

Oct. 27. *Master and Servant—Negligence—Workmen's Compensation Act—R.S.O. 1897, ch. 160, sec. 13, sub-sec. 5—Reasonable Excuse for Not Giving Notice—Release.*

Plaintiff, in the employment of the defendants, was, owing to their negligence, injured by the bursting of a blow pipe attached to a boiler in their mill. Defendants' manager knew of the accident the day it happened, and informed the chief engineer of a boiler insurance company in which defendants had an insurance policy. That official visited plaintiff during the third week of his confinement to bed and in a friendly way told him he would pay him \$30 to cover three weeks' wages, but did not do so. Plaintiff was confined to his bed for eight weeks and his doctor's bill was \$125. During his illness he complained to the defendants' manager that the \$30 had not been sent to him, and the latter, acting apparently as a friend, said he would look into it. Subsequently the plaintiff returned to work with defendants, and while with them the insurance company sent \$30 to defendants' manager, who paid it over to the plaintiff and got him to sign a release of all claims. No notice was given by plaintiff to defendants as required by sec. 13, sub-sec. 5, R.S.O. ch. 160, but the defendants were not prejudiced thereby.

*Held*, that by the conduct of the defendants, the plaintiff was thrown off his guard as to seeking legal advice, and he had reasonable excuse for not giving notice as required.

*Held*, also, on the evidence, that the plaintiff did not understand the situation and did not intend to release the defendants from all liability: and judgment was entered for the plaintiff for the amount assessed by the jury, less the \$30.

Judgment of ANGLIN, J., at the trial reversed.

AN appeal by the plaintiff from a judgment of Anglin, J.

The action was by an employee of the defendants for damages for injury, owing to their negligence, caused by the bursting of a pipe attached to a boiler in the defendants' mill.

The action was tried at the Toronto Assizes on the 12th and 13th of February, 1906, before ANGLIN, J., and a jury.

*J. M. Ferguson*, for the plaintiff.

*R. U. McPherson*, for the defendants.

The jury answered all the questions submitted by the Judge in favour of the plaintiff, and assessed the damages at \$250.

The learned trial Judge, however, dismissed the action, holding that no notice of action had been given within twelve weeks from the happening of the accident, under R.S.O. 1897, ch. 160, sec. 13, sub-sec. (5), and that while he might find that the defendants

were not prejudiced by the want of it, he could not find in the circumstances anything amounting to a reasonable excuse for not giving it, ignorance not being such an excuse; and that if necessary he would find that the release was given by the plaintiff with a knowledge of its contents, and was given by him with the full intention of releasing the defendants from all liability.

From this judgment the plaintiff appealed to a Divisional Court, and the appeal was argued on the 25th and 26th of September, 1906, before FALCONBRIDGE, C.J.K.B., BRITTON, and CLUTE, JJ.

*J. M. Ferguson*, for the appeal. The evidence shews that the defendants knew all about the accident and were not prejudiced by the want of notice of action. The plaintiff was misled by the friendly attitude of the defendants; he expected they would do what was fair, and did not seek his legal and strict rights, and under the circumstances the trial Judge should have found there was reasonable excuse for the want of notice as provided for by R.S.O. 1897, ch. 160, sec. 13, sub-sec. (5). When the plaintiff signed the release he thought he was only settling for three weeks' wages, as he understood from the insurance company's representative: *Begg v. Toronto R.W. Co.* (1905), 6 O.W.R. 239, *per* Garrow, J.A., at p. 241; *Beven's Employers' Liability*, 3rd ed., p. 95; *Doyle v. Diamond Flint Glass Co.* (1904), 8 O.L.R. 499; *Ellen v. The Great Northern R.W. Co.* (1901), 17 Times L.R. 453; *The Directors, etc., of the London and South-Western R.W. Co. v. Blackmore* (1870), L.R. 4 H.L. 610.

*R. U. McPherson*, *contra*, (called upon by the Court). The trial Judge was right in holding the want of notice was fatal. The statute provides it must be in writing, and the evidence shews there was no reasonable excuse for its omission: *Moyle v. Jenkins* (1881), 8 Q.B.D. 116. There was no disability to prevent the plaintiff from giving notice. The finding of the trial Judge on the question of the release should not be disturbed. The defendants did nothing to induce a settlement or obtain a release. The insurance company made the settlement in their own interest. The defendants were the mere instrument to get the release signed; they were not interested, as they looked to the insurance company for indemnity. The release is good as a compromise of a doubtful

D. C.  
1906  
SMITH  
v.  
McINTOSH.

D. C.  
1906  
SMITH  
v.  
McINTOSH.

claim: *North British Railway Co. v. Wood* (1891), 18 Ct. of Sess. Cas. 4th series (Rettie), p. 27; *Haist v. Grand Trunk R.W. Co.* (1894), 26 O.R. 19; (1895), 22 A.R. 504. The money paid by the insurance company has been retained by the plaintiff. It was not the defendants' negligence but the plaintiff's own negligence that caused the accident: *Armstrong v. The Canada Atlantic R.W. Co.* (1902), 4 O.L.R. 560; and he cannot recover: *The Dominion Iron and Steel Co. v. Day* (1903), 34 S.C.R. 387.

*Ferguson*, in reply.

October 27. The judgment of the Court was delivered by BRITTON, J.:—This is an action for damages sustained by the plaintiff on the 13th March, 1905, while employed as a steam engineer in the mill or factory of the defendants at Toronto.

The plaintiff was injured by the bursting of a blow-pipe attached to the boiler which supplied the steam power for defendants' mill.

The defendants, besides denying any negligence and alleging contributory negligence on the part of the plaintiff, set up the payment before action of \$30 in full settlement, satisfaction and discharge of plaintiff's claim. The further objection was taken, on motion for non-suit, that no notice was served as required by the Workmen's Compensation for Injuries Act.

The learned trial Judge submitted questions to the jury as to negligence, etc., and asked the jury to assess the damages. The jury answered all the questions in favour of the plaintiff, and assessed the damages at \$250.

Upon the motion by defendants for dismissal of the action, the learned Judge held that want of notice was fatal. In giving his decision he further said: "I would also find, if necessary, that the release given was given by the plaintiff with full knowledge of its contents, was given by him with full intention of releasing the defendants from all liability"; and upon the two grounds the action was dismissed.

The plaintiff appeals, and asks for judgment for \$250 upon the findings of the jury.

The grounds of appeal taken by the plaintiff in his notice of motion, which were relied upon on the argument are that the learned Judge erred,

(1) In holding that there was not reasonable excuse for the omission on the part of the plaintiff to give notice as required by the Workmen's Compensation for Injuries Act, and

(2) In holding good the document alleged to have been executed by the plaintiff, as a release by the plaintiff to the defendants so as to prevent plaintiff's recovery in this action.

This seems to me, upon all the evidence, to be clearly a case where under the Act there was reasonable excuse for the want of notice. It was practically conceded that the defendants have not been by want of the formal notice prejudiced in their defence. Mr. R. K. McIntosh, the manager of the defendants, knew of the accident on the day it happened, and he informed a Mr. Wickens, the chief engineer of the Canadian Casualty Boiler Insurance Co., in which company defendants held a policy, of this accident. Defendants knew that Wickens saw plaintiff shortly after the accident, and on the 25th March, 1905, defendants received Mr. Wickens' report. On the 26th March, plaintiff wrote to Mr. McIntosh about the matter, and on the 28th Mr. McIntosh replied stating in substance, if the matter was not arranged with Wickens, he McIntosh would go further into it, and making a suggestion as follows: "It might be well to leave this until you are here again, when I shall discuss the matter with you, for as no doubt you are aware, I shall do all I can to help you to obtain from those people sufficient to cover your loss for time and doctor's bill." To this letter plaintiff replied on 29th March, explaining from his point of view what had taken place between him and Wickens, and asking to have the \$30 which Wickens promised sent. This was not sent, and no reply was sent to plaintiff's last letter. In due course, after some weeks of remaining in bed, plaintiff returned to work for defendants. Mr. McIntosh appeared to desire to act as plaintiff's friend down to the 13th May, when the \$30 were handed over, and plaintiff continued to work for defendants until some time after that date. By the conduct of defendants, plaintiff was thrown off his guard as to seeking legal advice, and as to informing himself about giving and as to giving the statutory notice.

I think there was in this case such reasonable excuse for want of notice as is within the contemplation of the statute. The late case of *O'Connor v. City of Hamilton* (1905), 10 O.L.R. 529, refers to, and is consistent with, *Armstrong v. The Canada Atlantic R.W.*

D. C.

1906

SMITH

v.

McINTOSH.

Britton, J.



D. C.  
1906

SMITH  
v.  
McINTOSH.  
—  
Britton, J.

Co., 4 O.L.R. 560, and this case warrants my conclusion upon this point.

I confess to having had considerable difficulty in coming to a conclusion on the question of settlement and release. The case is very close to the line.

When the alleged settlement was made the plaintiff had gone back to work, and there then was the confidential relationship of master and servant between them.

There is a great deal to be said against allowing such a settlement to stand, reading all the evidence in the way most favourable to the defendants. The words of the Chancellor in *Doyle v. Diamond Flint Glass Co.* (1904), 8 O.L.R. 499, at p. 502, are appropriate to this case: "Fair play demands that better consideration should have been extended to her before extinguishing her rights. It is not the ordinary case of the compromise of a doubtful claim, but one in which the parties were not dealing on equal terms." No doubt the plaintiff was competent to make his own settlement if the parties had come together, the plaintiff making a claim and the defendants disputing it—either as to liability or amount, so there would have been discussion and determination once for all; but that is not what was done. Wickens, who was acting for the insurance company, was promptly at plaintiff's bedside, and so sympathetic that plaintiff, certainly at first, thought him some good friend willing to compensate him for three weeks' loss of wages.

It is not pretended now, that, if plaintiff is entitled to recover at all, this sum is anything like sufficient. It was in lieu of wages for three weeks—the third week having been entered upon—nothing for any further time and nothing for pain and suffering or for medical attendance. Inadequacy of consideration is not the test, but the circumstances must all be looked at to see whether the plaintiff's intention was then to release the claim, as defendants now assert. Plaintiff had no legal adviser, and although he could write his own name and do it very well, he could not write a letter. His son-in-law wrote two letters for him, and I may say at once that one of these, the letter of the 29th March, from plaintiff to McIntosh, was mainly the cause of my difficulty in determining just what plaintiff understood he was doing and intended to do, when he signed the receipt on the 13th May.

The accident happened on the 13th March. The plaintiff was in bed eight weeks. His medical attendant made about 54 visits and his account was \$125. The plaintiff's account of the alleged settlement, as given in examination and cross-examination, is in substance that quite a few days after he had gone back to work, McIntosh asked him if he was satisfied (with the settlement Wickens had made), and he said he was not, and McIntosh said he would telephone for Wickens. Wickens did not come to see the plaintiff. A few days after that conversation, plaintiff got a message that McIntosh wished to see him at the office. At the office McIntosh had the paper ready, and simply said, "Robert, sign this and I will pay you \$30 in money"—"Sign this cheque and I can draw the money out of the bank." "These were all the words, except that McIntosh asked me if I had my glasses." The plaintiff had, in another part of his examination, said, that at the first conversation after going back to work, he asked McIntosh if he was going to do anything for him, and McIntosh replied, "You have arranged with the boiler insurance company," and plaintiff asked McIntosh to telephone Wickens. Whether Wickens was telephoned for or not, he did not appear, and at the second interview, and at the office, the plaintiff signed the receipt and indorsed the boiler company's cheque for \$30, which that company had made payable to the order of the defendants. The plaintiff did not give candid or satisfactory answers as to his signature to the receipt. I think he knew that the signature was his and should have said so at once, and his hesitancy and beating about the bush makes it more difficult to accept his testimony when in conflict with other evidence. The plaintiff knew he signed a receipt and indorsed a cheque and for \$30.

The evidence of Mr. McIntosh is that after plaintiff returned to work he McIntosh was passing the boiler shop one morning and spoke to plaintiff, "asking him how he was feeling." Plaintiff replied that he was getting better. McIntosh said he had the \$30 for him, if he wanted to come and get it. Plaintiff said he would like to see Wickens first, and added, "would you telephone for me?" McIntosh says he did telephone, and got word that Wickens would come—but, as I have said, Wickens did not come. McIntosh said, further, that a few days after and when passing the boiler shop again, plaintiff asked him if Wickens had been

D.C.  
1906  
SMITH  
v.  
MCINTOSH.  
—  
Britton, J.

D. C.  
1906  
SMITH  
v.  
McINTOSH.  
—  
Britton, J.

there, or if he McIntosh had heard; McIntosh replied that he had not heard. Then plaintiff said, "Well, I guess I won't wait, I want to close it up, so I will take the \$30." McIntosh then said, "All right, I will be back in the office in a little while and I will send for you." Plaintiff, after a little, went to the office. McIntosh said, "Bob, this will clean the thing up." The receipt had been prepared. It was written out, and the indorsement on the cheque was made. . . . "I took him over to the second standing desk in the office and I said, 'Bob, this cleans the whole thing up; you had better read it.' He said, 'I have not my glasses,' and I said, 'I will read it to you.' I read it aloud and very distinctly, standing close to him, and he signed it in my presence. I turned over the cheque, and I said, 'This is the cheque made payable to me, I have indorsed it to you; you sign it and I will put it in the deposit and cash it for you.' He signed it and I gave him the \$30, and I said, 'Bob, this cleans the thing all up.'"

This evidence pre-supposes a settlement with Wickens, and there was no such settlement in fact. The evidence of Wickens is that he had only one interview with plaintiff, and then plaintiff told him he would be laid up for two or three weeks. Wickens states: "I told him I was sorry for him. I told him that if he would be satisfied perhaps I could get him enough to pay him for three weeks." "He said he was surprised—that he did not expect to get anything." So Wickens left and made a report to his company, which resulted in his company sending a cheque to the defendants for \$30. Wickens did not explain to the plaintiff why Wickens was to give the plaintiff the \$30, and he did not tell the plaintiff that the company was "amenable" in any way, but he did tell him that "the company had a policy covering the McIntosh place." Nothing more in the evidence of Wickens seems material. On cross-examination he said, that he thought the company was "practically" making a present to the plaintiff of \$30. If Wickens, instead of having to report to the defendants and having a cheque sent to them, had actually and under the circumstances as stated by himself, handed over the \$30, and taken such a receipt as was taken by McIntosh, could that be held as a binding release upon the plaintiff? I think not.

Wickens was simply interested for the insurance company, and he offered to pay for three weeks' wages because he thought plaintiff

would be back to work at the end of that time. When the alleged settlement actually took place the defendants knew that the plaintiff had been laid up for a much longer time than three weeks, and that plaintiff was not then well, but only "getting better." There seems to have been no negotiation for a settlement by defendants. They notified Wickens, and put him upon the case. There was the correspondence and the letter of 29th March, 1905, before referred to. This letter is the only thing that offers reasonable argument in favour of upholding the alleged settlement. The plaintiff is comparatively illiterate. He could not write, and I am inclined to think could not dictate, such a letter, although he would, as against defendants, if the letter was acted upon and if held to mean a settlement of his entire claim against the defendants, be bound by it. McIntosh admits that plaintiff did not read the receipt or read the indorsement on the cheque—plaintiff says because he could not read writing, McIntosh says because plaintiff had not his glasses.

With all the evidence before me, I have carefully read and considered the cases to which we were referred by the learned counsel for the defendants. In the *North British Railway Co. v. Wood*, Rettie 18, Ct. of Sess. Cas., 4th series, p. 27, "there was no relation of influence or confidence between the parties; they were certainly at arm's length:" *per* Lord Selborne at p. 31; and there could be no possibility of misunderstanding as to what was intended. Here, that plaintiff could even put forward a claim as of right—to say nothing of his chance for recovery—was kept out of sight, was not at all discussed: see *Begg v. Toronto R.W. Co.*, 6 O.W.R. 239.

I am of opinion, that all the cases cited are distinguishable upon the facts. The plaintiff, in my opinion, did not understand the situation, or that a complete release was being asked of him. He did not intend to release the defendants from all liability, if there was such liability. He intended to accept the \$30 as offered by the insurance company as indemnity for the three weeks' wages, and to that extent and so far as was under discussion, to release both insurance company and the defendants. It would not be difficult in very many cases for the representative of an insurance company by being early, after an accident, in communication with an injured person, and by expressions of sympathy, and by

D. C.

1906

SMITH

v.

McINTOSH.

Britton, J.



D. C.  
1906  
SMITH  
v.  
McINTOSH.  
Britton, J.

offering payment in lieu of wages, to get a receipt, purporting to be in full, which the person giving it would not understand to be a complete release to either the insurers or insured.

I do not express any opinion as to the position of the defendants with the Canadian Casualty and Boiler Insurance Company; I do not say that the defendants are at all prejudiced by what has taken place. It may be that Wickens did not state to the defendants fully and truly what had taken place between him and the plaintiff. If the defendants are prejudiced it may be by reason of Mr. McIntosh not seeing Wickens after the receipt of the cheque and after the receipt of plaintiff's letter of 29th March, before handing over the proceeds of the cheque. Apparently McIntosh intended to see him, else why did he wait until after plaintiff's return to work, before saying anything more to the plaintiff?

The damages found are \$250. There is no reason to think, from the learned Judge's charge, or from the question or answer, that the jury took the payment of \$30 into consideration in fixing the amount, so that sum should be deducted from the \$250.

I think the appeal should be allowed with costs, and judgment should be entered for the plaintiff against the defendants for \$220, and costs.

[Leave to appeal to the Court of Appeal was refused by the full Court on 14th November 1906.]

G. A. B.

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[IN THE COURT OF APPEAL.]

D. C.

1906

FEDERAL LIFE ASSURANCE CO. OF CANADA V. STINSON ET AL.

March 30.

C. A.

Dec. 24.

*Mortgage—Redemption—Priorities—Execution Creditors Proving Claims in Master's Office—Payment of Mortgagee's Claim—Subsequent Statutory Assignment by Mortgagor for Benefit of Creditors—Rights of Assignee—Assignments and Preferences Act, sec. 11.*

Upon the usual reference under a judgment for foreclosure or redemption in an action upon a mortgage, four judgment creditors of the mortgagor having writs of *fi. fa.* lands in the sheriff's hands were added as parties in the Master's office, and proved claims upon their respective judgments. The Master made his report by which he found that they were the only incumbrancers, and appointed a day for payment by them of the amount found due to the plaintiffs as mortgagees. After confirmation of the report, the respondent obtained assignments of the judgment, and was added as a party defendant by the Master's order. He then redeemed the plaintiffs by payment of the amount found due, and the Master took a subsequent account as between him and the mortgagor in respect of his claims on the mortgage and judgments, and appointed a day for payment by the mortgagor of the total amount. After confirmation of this report, and before the day named for payment, the mortgagor made an assignment for the benefit of his creditors under the Assignments and Preferences Act to the appellant, upon whose application an order was made adding him as a party, extending the time for redemption, and directing a reference back to the Master to take a new account and appoint a new day:—

*Held*, MEREDITH, J.A., dissenting, that, notwithstanding the provisions of sec. 11 of the Assignments and Preferences Act, the appellant was not entitled to redeem by payment of the amount due upon the mortgage only, and thus take priority of the respondent in respect of his claim upon the judgments.

*Per* OSLER, J.A.:—Before the assignment to the appellant, the respondent had acquired a new and independent status. By the adjudication of the Court he acquired a lien, charge, or incumbrance upon the lands, and the right as such incumbrancer to redeem the mortgagees—a right which he exercised before the appellant, *pendente lite*, acquired the equity of redemption by the assignment. Before this, too, his claims on the mortgage and judgments had been consolidated and his right to be redeemed by the mortgagor, in respect of the whole, declared. An interest or charge of this nature is not affected by the Act.

*Baker v. Harris* (1810), 16 Ves. 397, applied.

Order of a Divisional Court affirmed.

THIS was an action of foreclosure brought against the mortgagors, one James Stinson and his wife, wherein the plaintiffs obtained a judgment directing the usual reference to the local Master at Hamilton to take the accounts. The Master gave the required notice, under Rule 746, Form 77, for creditors to come in and prove their claims. Four execution creditors proved their claims and were joined as parties, and were directed by the Master to redeem the plaintiffs by the 29th

D. C.  
1906  
FEDERAL  
LIFE  
ASSURANCE  
CO. OF  
CANADA  
v.  
STINSON.

November, 1905. One W. J. Swanson purchased the claims of these execution creditors, and a few days prior to the day appointed for redemption he redeemed the plaintiffs, pursuant to the terms of the Master's report, paying the redemption money into Court, and the mortgage was assigned to him. The Master then took a new account, and directed the defendants by writ, namely, the mortgagors, on the 12th January, 1906, to redeem Swanson, both as assignee of the plaintiffs, the mortgagees, and of these execution creditors.

On the 2nd January, 1906, the defendant James Stinson made an assignment for the benefit of creditors to one C. S. Scott, who then applied to be added as a party, and for an extension of the time for redemption, alleging that the plaintiffs had received rents which had not been credited in their mortgage account, and also that the claims of the execution creditors had been cut out by the assignment for the benefit of creditors.

On the 9th January, 1906, the application was heard before Mabee, J., in Chambers, when an order was made adding Scott as a party, and referring the action back to the Master to appoint a new day for redemption, leaving open for decision by the Master the questions as to the receipt of the rents and the effect of the assignment for the benefit of creditors.

The Master ruled that Scott was entitled, as against Swanson, to open up the mortgage account, and to go into the question of the rents, and also to redeem Swanson on paying only the amount which might be found due under the plaintiffs' mortgage, irrespective of the amount due to him as assignee of the execution creditors.

From this ruling the defendant Swanson appealed to a Judge in Court, and on the 22nd February, 1906, the appeal was allowed by FALCONBRIDGE, C.J.K.B.

The defendant Scott appealed from the order, and on the 28th March, 1906, the appeal was heard before a Divisional Court composed of BOYD, C., MAGEE and MABEE, JJ.

*D. L. McCarthy*, for the appellant. The amount of rents received should be credited on the mortgage. [The Court ordered the amount to be paid into Court on the mortgagors consent-

ing.] Then, as to Scott's right to redeem, the assignee Scott takes priority over these execution creditors. Section 11 of the Assignments Act, R.S.O. 1897, ch. 147, as amended by 3 Edw. VII. ch. 7, sec. 29 (O.), provides that the assignment shall take precedence of all judgments and executions not completely executed by payment, subject to the lien, if any, of an execution creditor for his costs, etc. So long as the money has not been paid over, the assignee is entitled to redeem, freed from any liability to these execution creditors, for they are in no better position than the other judgment creditors, and Swanson occupies no better position than his assignors: *Carter v. Stone* (1890), 20 O.R. 340; *Harvey v. McNeil* (1888), 12 P.R. 362. In any event, a sale of the property should be directed under Con. Rules 378-380. The Court has power to direct a sale at any time before the action is terminated.

*Hamilton Cassels*, K.C., and *R. S. Cassels*, for the respondent, Swanson. The rights acquired by the execution creditors should not now be taken away from their assignee. They would have been foreclosed had they not preserved their rights, and they would also have been barred by the Statute of Limitations. A creditor foreclosed by the Master's report, and subsequently allowed to come in and prove, must rank after the incumbrancers who have proved: *Becher v. Webb* (1879), 7 P.R. 445; *City Bank v. McConkey* (1867), 3 U.C.L.J.N.S. 125. Swanson legally acquired the rights of these execution creditors. He is in the same position as a purchaser for value in good faith: R.S.O. 1897, ch. 121, sec. 33; *Collins v. Denison* (1869), 2 Ch. Ch. 465; *Gunn v. Doble* (1869), 15 Gr. 655. The Assignments Act does not apply. The executions have, so far as Swanson is concerned, been satisfied by payment: *Clarkson v. Severs* (1889), 17 O.R. 592; *Attorney-General for Ontario v. Attorney-General for Canada*, [1894] A.C. 189; *Abraham v. Abraham* (1890-1), 19 O.R. 256, 18 A.R. 436; *Merritt v. Stephenson* (1858), 7 Gr. 22; *Ross v. Stevenson* (1877), 7 P.R. 126; *Selby v. Pomfret* (1861), 3 D. F. & J. 595; *Baker v. Harris* (1810), 16 Ves. 397. A sale should not be directed. The decisions on the point are no doubt conflicting, but the weight of authority is against allowing a sale after foreclosure: *Girdlestone v. Lavender* (1852), 9 Hare Appendix LIII.; *Laslett v. Cliffe* (1854), 2 Sm. & G. 278; *London and County Banking Co. v. Dover* (1879), 11 Ch. D. 204; *Union Bank*

D. C.  
1906  
FEDERAL  
LIFE  
ASSURANCE  
CO. OF  
CANADA  
v.  
STINSON.



D. C.  
1906  
FEDERAL  
LIFE  
ASSURANCE  
CO. OF  
CANADA  
v.  
STINSON.

*of London v. Ingram* (1882), 20 Ch. D. 463; *Trust and Loan Co. v. Reynolds* (1866), 2 Ch. Ch. 41. Even if the Court has the power to direct a sale, this is not a case where the power will be exercised. The mortgagee made every attempt to sell, and was unable to realize sufficient to pay off the claims. There is nothing to shew that there is any likelihood of a sale now being effective. The Courts will not encourage speculative sales, and especially where, as here, there has been laches: *Cameron v. Cameron* (1869), 2 Ch. Ch. 375; *Miles v. Cameron* (1883), 9 P.R. 502; *Cameron v. Wolfe Island Co.* (1873), 6 P.R. 91.

March 30. The judgment of the Court was delivered by BOYD, C.:—By the report of the 29th May, 1905, the Master under the order of reference found what was due to the plaintiffs in respect of the mortgage, and also what was due to the four execution creditors who came in pursuant to notice (Rule 746, Form 77), and proved their claims; he also settled the priorities as between all the parties to the action who had proved claims—these four ranking in order after the plaintiffs'. He certifies that these are the only incumbrances upon the mortgaged property. He also appoints a day for the four subsequent incumbrancers to pay off the claim of the plaintiffs on the footing of the mortgage. All this matter is now *res judicata*, and puts the creditors who have proved in a different position from the status they once occupied as judgment or execution creditors. Their claims now attach upon the property, and they are entitled to redeem and share in the benefits of the action to the exclusion of all other creditors who have failed to come into the litigation, and whose claims are not established before the Master.

W. J. Swanson acquired the claims of the four subsequent incumbrancers, and paid the redemption money to the mortgagees, the plaintiffs, within the time limited, and thereupon the Master made his subsequent report of the date 12th December, 1905, and took the subsequent account of what was due in respect of the redemption money and these four claims proved, and appointed the aggregate sum to be paid by the mortgagors on the 12th January, 1906.

This matter was also *res judicata* before the transfer of interest occurred on the 2nd January, when the appellant Scott was ap-

pointed assignee of Stinson under R.S.O. 1897, ch. 147, sec. 11, as amended by 3 Edw. VII. ch. 7, sec. 29 (O.)

It is now urged that Scott should be entitled to redeem *quoad* the mortgage money, but that the four assignments of the claims of the subsequent incumbrancers should be dealt with under the footing of the Assignments Act, R.S.O. 1897, ch. 147, as being claims of judgment or execution creditors whose executions have not been completed by payment.

This position appears to me quite untenable. These claims have passed beyond the judgment and execution stage, and are not within the meaning of the Act. The assignment takes precedence of the various varieties of process mentioned in the new section, including "orders appointing receivers by way of equitable execution;" but it cannot operate as to parties in this mortgage action whose priorities have been determined by the Court to the exclusion of all other creditors, including those represented by the assignee. These claimants have taken advantage of the litigation, and have taken steps in faith thereof, and are entitled to be secured by the Court in any benefit thus obtained. The assignee can get no relief in this action other than that claimable by his assignor—the right to redeem all these securities as consolidated in the report of the Master. The estate came to the hands of the assignee (as to this part of it) burdened by the various incumbrances so declared by the action of the Court, and the transfer of interest in the equity of redemption to the assignee pending litigation, and, at this stage of it, cannot revolutionize what has been done.

If a deposit of \$300 is made to answer the expenses of sale, and the assignee undertakes to pay further expenses of sale, if any, the judgment may go for sale instead of foreclosure, on a day and upon terms to be settled by the Master at Hamilton.

The costs of the appeal to be added to the redemption money to be paid by the assignee.

The defendant Scott appealed to the Court of Appeal from the decision of the Divisional Court, and his appeal came on for hearing before MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A., on the 2nd and 3rd October, 1906.

D. C.

1906

FEDERAL  
LIFE  
ASSURANCE  
CO. OF  
CANADA  
v.  
STINSON.

Boyd, C.

C. A.  
1906  
FEDERAL  
LIFE  
ASSURANCE  
CO. OF  
CANADA  
v.  
STINSON.

*H. Cassels*, K.C., and *R. S. Cassels*, for the respondent, the defendant Swanson, moved to quash the appeal, upon the ground that the appellant, the defendant Scott, had accepted the measure of relief given by the Divisional Court, and was at the same time appealing. They argued that the appellant could not take the benefit of one part of the order and at the same time appeal against another part, citing *International Wrecking Co. v. Lobb* (1887), 12 P.R. 207; *Re Smart Infants* (1888), *ib.* 635; *Phillips v. City of Belleville* (1905), 10 O.L.R. 178; *Videau v. Westover* (1898), 29 O.R. 1, 6.

*D. L. McCarthy*, for the appellant, was not called upon in answer to the motion.

THE COURT dismissed the motion, but reserved the costs of it. *McCarthy*, for the appellant. The appeal raises a novel point as to the effect of sec. 11 of the Assignments Act, R.S.O. 1897, ch. 147, as amended by 3 Edw. VII. ch. 7, sec. 29. The section now reads: "An assignment for the general benefit of creditors under this Act shall take precedence of attachments, of garnishee orders, of judgments, and of executions not completely executed by payment, and of orders appointing receivers by way of equitable execution, subject to the lien, if any, of an execution creditor for his costs where there is but one execution in the sheriff's hands, or to the lien, if any, for his costs, of the creditor who has the first execution in the sheriff's hands." The appellant is the assignee for the benefit of the creditors of Stinson, and is entitled to priority over Swanson, who is the assignee of certain execution creditors. The Chancellor says that these execution creditors' claims, by reason of the Master's report, have passed beyond the judgment and execution stage, and that execution creditors who have proved claims are in a different position from that which they occupied as judgment or execution creditors. This view is erroneous, I submit. It is only as execution creditors that the rights of these persons arise, and it is only as such that they now subsist, notwithstanding the interim report of the Master. The report has no effect as altering the status. It does not make them any more or less execution creditors. The Master cannot deal with them otherwise than as execution creditors. The Chancellor also says that the appellant as assignee can get no relief in this action other than that claimable by his assignor—the right to redeem. But

that is not giving due effect to the section quoted, by which an assignee for the general benefit of creditors under the statute must necessarily be in a better position as to executions than his assignor. The principle of the Act is to prevent execution creditors obtaining an advantage over other creditors in an assignment, and to provide for all creditors ranking *pari passu*. The report of the Master cannot make the executions "completely executed by payment." There is no payment to the sheriff or any one else in satisfaction of the execution. Until a final order of foreclosure is made, the executions are still executions, and in this case there cannot be a final order of foreclosure, and the execution creditors must rank as such on the proceeds of the sale. See *Carter v. Stone*, 20 O.R. 340; *Wood v. Joselin* (1890), 18 A.R. 59.

*Hamilton Cassels*, K.C., for the respondent. An assignee under the Assignments Act has no higher rights than his assignor, unless such rights as the statute confers. Unless the appellant comes within sec. 11, the rights which their diligence secured for the judgment creditors, now represented by the respondent, cannot be interfered with. Section 11 does not cover this case; it deals with executions which are being enforced by a sheriff, and is merely supplemental to the provisions of the Creditors' Relief Act: *Clarkson v. Severs*, 17 O.R. 592; *Abraham v. Abraham*, 19 O.R. 256, 18 A.R. 436. There were two or more mortgages upon the land in question in this action, and the writs of execution issued under the judgments recovered by the respondent's assignors could not have been enforced by the sheriff against these lands. These writs created only equitable liens to be enforced by appropriate equitable procedure: *Glover v. Southern Loan and Savings Co.* (1901), 1 O.L.R. 59; *Kerr v. Styles* (1879), 26 Gr. 309. This is not equitable execution. Legal rights may be lost: *City Bank v. McConkey*, 3 U.C.L.J.N.S. 125. See Rules 378, 379, *et seq.*; *Canada Landed Credit Co. v. McAllister* (1874), 21 Gr. 593.

*R. S. Cassels*, on the same side. Each of the judgment creditors (of whom the respondent is the assignee), under peril of forfeiture of all rights against the lands in question, proved a claim, and has been adjudged to have a lien, charge, or incumbrance, and sec. 11 does not apply thereto: *Abraham v. Abraham*, 19 O.R. 256, 18 A.R. 436; *Roberts v. Bank of Toronto* (1894), 21 A.R. 629. See *Glover v. Southern Loan Co.*, 1 O.L.R. 59, as to bringing in execution

C. A.

1906

FEDERAL  
LIFE  
ASSURANCE  
CO. OF  
CANADA  
v.  
STINSON.



C. A.  
1906  
FEDERAL  
LIFE  
ASSURANCE  
CO. OF  
CANADA  
v.  
STINSON.

creditors as parties. The respondent is a purchaser for value with notice of a confirmed report. He paid off the plaintiffs, and paid the money into Court as directed by the Master. A judgment creditor who has proved a claim in the Master's office cannot proceed by execution outside the Master's office: *Cahuac v. Durie* (1863), 9 Gr. 485. The same principle will be found in *Goodwin v. Williams* (1855), 5 Gr. 178; *Becher v. Webb*, 7 P.R. 445; *Cameron v. Wolfe Island Co.*, 6 P.R. 91; *Trimble v. Williamson* (1873), 49 Ala. 525. The respondent is entitled to consolidate the claims under the writs of execution with the claim under the mortgage acquired by him, and this right is not affected by sec. 11: *Fisher on Mortgages*, 5th ed., p. 539; *Baker v. Harris*, 16 Ves. 397; *Selby v. Pomfret*, 3 D. F. & J. 595; *Gilmour v. Cameron* (1857), 6 Gr. 290, 302. The respondent acquired the claims of the execution creditors in good faith, and his rights should not be interfered with at the instance of an assignee of the debtor claiming under an assignment made *pendente lite*, after the respondent's rights had been established and after great delay, and only for the purpose of attempting to deprive the respondent of the fruits of the proceedings properly taken by him and his assignors.

*McCarthy*, in reply. What was the act which made the statute inoperative? What the Master did was nothing more than finding the amount. The persons added in the Master's office by reason of having executions in the sheriff's hands never lose their character of execution creditors.

December 24. OSLER, J.A.:—This was an action for the foreclosure of a mortgage made by the defendants the Stinsons. The usual judgment for foreclosure or redemption was directed and the usual inquiries and accounts ordered to be made and taken by the local Master at Hamilton.

In the course of the proceedings the defendants Sullivan, Bradley, Cashman, and Campbell, four execution creditors of the mortgagor, were made parties to the action and proved claims upon their respective judgments.

On the 29th May, 1905, the Master made his report finding that the plaintiffs and these creditors were the only incumbrancers upon the mortgaged premises. The 29th November, 1905, was appointed

by the report for payment by the latter of the amount found due to the mortgagees.

After the filing and confirmation of the Master's report and shortly before the day fixed for payment, the respondent obtained assignments of the judgments held by the four subsequent incumbrancers, and by the Master's order of the 28th November, 1905, he was added as a party defendant to the action, which was continued and ordered to stand as to him and the other defendants in the same plight and condition as before.

Swanson then redeemed the mortgagees by payment of the \$12,861.19 found due to them by the report, and the Master proceeded to take a subsequent account as between him and the mortgagors in respect of his claim on the mortgage and the judgments. By a further report dated the 12th December, 1905, the Master found the total sum due to the respondent on this footing with subsequent interest and costs up to the 12th January, 1906, to be \$24,340.36, which he appointed to be paid to him by the mortgagors on the last mentioned day.

This report was also duly filed and confirmed.

On the 2nd January, 1906, the defendant James Stinson made an assignment under the Assignments and Preferences Act to one Scott, upon whose application an order was made by Mabee, J., on the 9th January, 1906, extending the time for redemption by the Stinsons for one month from the 12th January, 1906, adding Scott as a party to the action, and referring the case back to the Master to take a new account and appoint a new day for redemption.

On the matter again coming before the Master, he ruled and certified, *inter alia*, that he should open the whole mortgage account, and that the defendant and now appellant Scott, as assignee for the creditors of Stinson, was entitled to redeem by paying the amount of the mortgage claim and in priority to the claims of the execution and judgment creditors held by the respondent Swanson.

On appeal by the latter an order was made by Falconbridge, C.J., for which no reasons are reported, setting aside the certificate and referring the action back to the Master to take a new account of the amount due to Swanson "as assignee of the plaintiffs and as assignee of the subsequent incumbrancers, as set out in the reports of the 29th May and 12th December, 1905,"

C. A.

1906

FEDERAL  
LIFE  
ASSURANCE  
CO. OF  
CANADA  
v. A  
STINSON.  
Osler, J.A.

C. A.

1906

FEDERAL  
LIFE  
ASSURANCE  
CO. OF  
CANADA  
v.  
STINSON.  
Osler, J.A.

and to appoint a new day for redemption or payment by Scott to Swanson of the whole.

Scott in his turn appealed from this order to a Divisional Court, contending that the learned Judge had no jurisdiction to interfere with the order of Mabee, J., and the direction given thereby, and had erred in holding that Scott as assignee for the benefit of creditors did not under the statute take priority over the creditors whose claims had been proved in the Master's office and acquired by Swanson, and that Scott was not entitled to redeem the mortgage irrespective of such claims. He also moved to have the judgment of foreclosure turned into a judgment for sale, etc.

The Divisional Court dismissed the appeal, but also ordered that the appellant might have a sale, if he chose to pay into Court \$300 as security for the costs and expenses of the proceeding, and complied with the other conditions imposed by the order. Further accounts were in that event directed to be taken, and the sale was to take place without the appointment of a new day. In the event of a sale taking place, it was further ordered and declared that Swanson was entitled to be paid out of the proceeds, in priority to Scott, the amounts due in respect as well of the mortgage as of the judgments.

From this order Scott, being still dissatisfied, has brought the present appeal.

A motion before Garrow, J.A., to quash the appeal, on the ground that the appellant had accepted a sale on the terms of the order, and had paid into Court the sum of \$300, was referred to the full Court, and argued on the hearing of the appeal.

As regards the motion to quash the appeal, it may be that the appellant has waived his right to appeal by acting on the alternative given to him by the order he appeals from, and converting the judgment for foreclosure into a judgment for sale, upon the conditions which the Court thought fit to impose in granting him the favour he applied for. It is not, however, necessary to decide this, as the case has been argued, and very well argued, upon the merits, and these may form the ground of our judgment.

The appellant relies altogether upon the provisions of sec. 11 of the Assignments and Preferences Act, R.S.O. 1897, ch. 147, substituted for the original sections by 3 Edw. VII. ch. 7, sec. 29:



"An assignment for the general benefit of creditors . . . shall take precedence of attachments, of garnishee orders, of judgments and of executions not completely executed by payment and of orders appointing receivers by way of equitable execution, subject to the lien if any of an execution creditor for his costs," etc.

He contends that upon the execution of the assignment of the 2nd January, 1906, all the proceedings which had theretofore been had in the action affecting the claim of the judgment creditor went for nothing, were reduced, as Lord Eldon expresses it in *Ex p. Knott* (1806), 11 Ves. 609, 619, to dust and ashes, and that he became the only person entitled to redeem the mortgage, to the exclusion of all rights which the judgment creditor had theretofore acquired by such proceedings.

With this contention, leading to so extraordinary and unjust a result, I do not agree, and substantially for the reasons assigned by the learned Chancellor in the Court below.

The case is one not within the contemplation of the Act, nor provided for by it.

Before the assignment to the appellant had been executed, the judgment creditor had acquired a new and independent status. He was no longer a mere judgment creditor. As such he never had a lien on the mortgaged premises, and whatever right of that nature he had theretofore acquired had ceased to rest upon his executions. These it was no longer necessary for him to renew, nor, having proved his claims on the judgments, as he was required to do in the mortgage action, could he have enforced them against the lands by means of the executions: *Cahuac v. Durie*, 9 Gr. 485. By the adjudication of the Court in this action he was declared to have, and by it he acquired, a lien, charge, or incumbrance upon these lands, and the right as such incumbrancer to redeem the mortgagees—a right which he exercised before the appellant, *pendente lite*, acquired the equity of redemption by the assignment. Before this, too, his claims on the mortgage and judgments had been consolidated by the report of the 12th December, 1905, and his right to be redeemed by the mortgagors, in respect of the whole, declared and adjudicated. An interest or charge of this nature is not affected by the Act any more than would be a mortgage (not obnoxious to the preference clauses of the Act) to secure the amount recovered by the judgments.

C. A.

1906

FEDERAL  
LIFE  
ASSURANCE  
CO. OF  
CANADA  
v.

STINSON.

Osler, J.A.



C. A.  
 1906  
 FEDERAL  
 LIFE  
 ASSURANCE  
 CO. OF  
 CANADA  
 v.  
 STINSON.  
 Osler, J.A.

This view is supported in principle by the case of *Baker v. Harris*, 16 Ves. 397, cited by Mr. R. S. Cassels. The language of the Bankrupt Act there in question, 21 Jac. I. ch. 19, sec. 9, was not less stringent than that of our Act in postponing the rights of the judgment creditor, but it was held that it related only to judgments which continued merely such at the time of the bankruptcy, not to those which before then had acquired all the effect of an actual mortgage, and for which the creditor had a complete lien on the land. That lien he has acquired in the present case (it is enough to say) by the proceedings in the action. It is not necessary to determine whether, as having succeeded to the rights of the first mortgagee, he could, merely as such, as in that case it was held he could, tack his subsequent judgment to the mortgage as against the assignee: see also *Selby v. Pomfret*, 3 D.F. & J. 595; and *Carter v. Stone*, 20 O.R. 340, 342.

On this short ground I would dismiss the appeal, and with costs, not including the costs of the motion to quash.

MOSS, C.J.O., GARROW and MACLAREN, JJ.A., agreed in the result.

MEREDITH, J.A.:—The one question is whether the appellant, as assignee for the general benefit of creditors, under the Act respecting Assignments and Preferences by Insolvent Persons, R.S.O. 1897, ch. 147, is entitled to take precedence of execution creditors of the insolvent, who have proved their claims in the Master's office, in a mortgage action.

Section 11 of that Act provides that: "An assignment for the general benefit of creditors under this Act shall take precedence of . . . all executions not completely executed by payment. . . ." We ought not to examine the enactment microscopically with a view to minimizing its effect; the well-known canon of construction, as well as the express mandate of the Legislature, requires that it should receive such liberal construction as will best ensure the attainment of the object of the Act. Past experience, in contracting its effect, shews the un wisdom of so doing. It is not eminently satisfactory to minimize, only to have the Legislature, in plainer words, counteract the effect of adjudication. The purpose of the Legislature, the object

of the enactment, is plain, namely, in cases of assignments for the general benefit of creditors, to put creditors upon an equal footing—to abolish preference and priority—in the cases covered by the Act; to take away the benefit of that extra vigilance which results in increasing the burden of the debt, by law costs, in an effort to get an advantage over other creditors.

The enactment was meant to be very far-reaching in its effect, intercepting even moneys made under execution, up till the time of payment over.

In this case the respondent was held—reversing a decision in the Master's office—to be without the provisions of the enactment, although his claim is upon executions “not completely executed by payment;” and the sole ground for taking the case out of the statute was that the claim under such executions has been proved in the Master's office upon a reference as to subsequent liens, charges, and incumbrances in a mortgage action, which it was said put the respondent in an entirely different position from that of an execution creditor, and made the claim to “now attach upon the property.” But surely it was attached to the property in just the same manner before as after proof in the Master's office; the only “attachment” was and is by virtue of the lien created by the execution. What other character can it have acquired? What is the nature of it; and what is the name applied to it in the laws of real property? It was solely by virtue of such a lien that the execution creditors were made parties in the Master's office; the general Rules require that this should be done—744, 746—and that certificates of the sheriff should be obtained and brought into the Master's office for that purpose—745. What sort of power has the Master to create a new incumbrance upon lands? And how is it registered? Or is it without the registry laws? Is there something yet undone after a *bonâ fide* purchaser for value has searched the registry, and the sheriff's office; must he inquire in all the Masters' offices in the Province? The Master's power is merely to ascertain and state what liens, charges, and incumbrances are subsisting against the property, and to settle their priorities; and his report, properly worded, is that under and by virtue of a certain judgment and writs of execution sued out thereupon, and in the hands of the sheriff for execution, the execution creditor is entitled to a lien upon the mortgaged property for so much for debt and costs,

C. A.  
1906  
FEDERAL  
LIFE  
ASSURANCE  
CO. OF  
CANADA  
v.  
STINSON.  
Meredith, J. A.

C. A.

1906

FEDERAL  
LIFE  
ASSURANCE  
CO. OF  
CANADA  
v.

STINSON.

Meredith, J. A.

etc. The character of the lien is in no sense changed; its character and extent are merely ascertained and stated so that the execution creditor may share in the surplus proceeds of the sale of the incumbered property, just as he would if the sale had been made in the sheriff's office under the execution. The sale taking place in Court, under the prior mortgage, the Court becomes the paymaster of the whole of the proceeds, instead of handing the surplus over to the sheriff to distribute. The priorities of the holders of liens, charges, and incumbrances must necessarily be ascertained, but that must be as they actually exist, not on any new basis; it is just what would have to be done by the sheriff, or an interpleader, if there were any real question as to their standing, before payment could be made by him. It was said that it was not necessary to renew the execution after proof in the Master's office. Assume—without assenting or dissenting—that to be so, how does it help the respondent upon this question? If the sheriff had levied upon the land, instead of the Court administering it, it would be quite unnecessary to renew in order to retain priority. In this case the most that can be hoped for must be but a small payment on the first judgment. All the executions remain in full force in the sheriff's hands; are they taken altogether out of the enactment by reason of proof in the Master's office; or are they to be subject to it in part and free from it in part? Are they two liens, one under the executions and one under the Master's report? The respondent's whole right must surely rest, as a lien upon the land, upon his writs of execution, the amount and priority of which are merely ascertained and stated by the Master in accordance with their position in the sheriff's office; and it can make no manner of difference that some execution creditor may not have thought it worth while to prove his claim in the Master's office.

No sort of authority has been referred to which in any way supports the respondent's position. The cases of *Goodwin v. Williams*, 5 Gr. 178, and *Cahuac v. Durie*, 9 Gr. 485, have really no bearing upon the question in this case. In the former a person who was held to be the real plaintiff, and who had a decree for sale in a mortgage action, was enjoined from selling under a subsequent judgment which he also held, in a manner which "would in fact be throwing the property away." In the latter a judgment creditor who had proved his claim in a mortgage action was considered



entitled to maintain his writ of execution but not to sell the mortgaged property under it; the question being one merely between subsequent incumbrancers who had both proved their claims in the Master's office. The cases of *Cameron v. Wolfe Island Co.*, 6 P.R. 91, and *Becher v. Webb*, 7 P.R. 445, shew only that an incumbrancer who has neglected to prove his claim, and has been foreclosed, may be put upon terms on being let in subsequently. But here there was no negligence on the part of the assignee; he applied promptly, and was properly, if not necessarily, made a party, and was so made unconditionally; and a new account was thereupon directed to be taken by an order which has not been called in question, but stands unimpeached.

Assuming, however, that the respondent's claim is not upon the writs of execution, then it must be by virtue of and upon the judgment in the mortgage action, and that is equally within the provisions of the enactment which provides that "An assignment . . . shall take precedence of . . . all judgments." What the Act aims at is to prevent simple creditors obtaining a preference over other like creditors, merely by means of legal proceedings for the recovery of the debt; and the respondent is well within both its letter and spirit.

But Mr. R. S. Cassels has appealed to the somewhat antiquated equity—and doubtless sometimes inequitable equity—which went and still goes under the title of the doctrine of tacking; and has relied upon the case of *Baker v. Harris*, 16 Ves. 397, in the hope of getting for the respondent the right of a first mortgagee in respect of the judgments in question. The doctrine of tacking was in substance a scheme by which a subsequent incumbrancer might obtain priority over those who were prior to him. It was in one of the earlier cases, named *tabula in naufragio*, by Lord Hale; but the circumstance that to avail one's self of it, the plank is generally seized, and always made use of, for the purpose of submerging another incumbrancer, having a better right, does not seem to have been worth naming, even if worth any sympathetic thought.

I observe that it is said in the Am. & Eng. Encyc. of Law, vol. 20, p. 1054, that tacking is forbidden by statute in this Province, the writer relying upon the broad statement made by Boyd, C., in the case of *Stark v. Reid* (1895), 26 O.R. 257, at p. 269, but which must be read in connection with the circumstances of the case.

C. A.  
1906  
FEDERAL  
LIFE  
ASSURANCE  
CO. OF  
CANADA  
v.  
STINSON.  
Meredith, J.A.



C. A.  
 1906  
 —  
 FEDERAL  
 LIFE  
 ASSURANCE  
 Co. OF  
 CANADA  
 v.  
 STINSON.  
 —  
 Meredith, J.A.

Tacking is not forbidden by statute in this Province, but, under the Registry Act, "no equitable lien, charge, or interest shall be deemed valid in any Court of this Province as against a registered instrument executed by the same party, his heirs or assigns; and tacking shall not be allowed in any case to prevail against the provisions of this Act." R.S.O. 1897, ch. 136, sec. 98; and under the next preceding section priority of registration shall prevail except in cases of actual notice: see *Dominion Savings and Investment Society of London v. Kittridge* (1876), 23 Gr. 631. If the respondent has, therefore, the right to tack, I know of nothing in any statute of this Province expressly preventing it, in the circumstances of this case.

But is the case one of tacking at all? There is no intermediate incumbrancer, nor suggestion of avoiding circuitry of action; the respondent has redeemed the mortgage and procured assignments of all the subsequent incumbrances; the single question is whether he can, in respect of such subsequent incumbrances, have a preference over other the creditors of the execution debtor, in the administration of that debtor's estate. There are many obstacles in the way of applying the doctrine of tacking to the case. The respondent has not a charge upon the land in respect of his executions, such as was formerly the case with a registered judgment; he has at most merely a lien. But it is not necessary to consider whether such a lien is sufficient to give the holder any right to tack. Again there is no evidence of the respondent having advanced any money in respect of these liens on the faith of acquiring a charge upon the land; and if he had he must be taken to have done so with a knowledge of the law, which takes away any preference they might give, in case of an assignment for the general benefit of creditors, under the Act, before the executions become "completely executed by payment;" and again the respondent is but a purchaser *pendente lite*; and not only were the priorities and rights of all parties settled under the judgment before he acquired any right and was permitted to come in as a party to the action, but have been again settled at his instance, and now remain so settled as follows,—the mortgage first and the judgments afterwards in the proper order. No attempt was ever made to tack. After decree settling priorities, it is too late: *Ex p. Knott*, 11 Ves. 609. The claim of right to tack, as I understand the facts, was

first made in the Divisional Court, and was not given effect to there. It is self-evident that it was not allowed in the Master's office. If it had been, the respondent, instead of the assignee, would have succeeded there, and there could not have been this appeal. Tacking meant adding the amount of the claims on the executions to the amount of the mortgage, making them a part of it: that was essential to tacking. Instead of that, the mortgage and each execution was dealt with separately, and their priorities ascertained and stated; and throughout they were kept separate and reported upon separately, and numbered in the order of their priority. The case is one for tacking or nothing, the mortgage and the claims on the executions being against the same lands. Consolidation applies only when the incumbrances are on different lands. Tacking rests upon that which some may think a somewhat unhappy application of the maxim that when equities are equal the law prevails; consolidation is based on the rule that he who seeks equity must do equity. No claim to consolidate was ever made, nor, if it had been made, could ever have been given effect to, in this case; and I can have no manner of doubt that, in all these circumstances, the doctrine of tacking is also quite inapplicable.

The case of *Baker v. Harris*, 16 Ves. 397, was decided nearly a century ago, and the enactment there in question was passed now nearly three centuries ago—21 Jac. I. ch. 19, sec. 9. It seems to have been a pure case of tacking; the subsequent incumbrancer had seized the *tabula*, for offensive purposes; the incumbrancer before him endeavoured to use that ancient enactment to avoid submersion, but it was held to be ineffectual. Whatever may be the effect of *Baker v. Harris*, in this Province, in these days, it certainly does not rule this case, in all the circumstances of it which have been mentioned.

I would allow the appeal, and restore the ruling of the learned Master.

*Appeal dismissed with costs; MEREDITH, J.A., dissenting.*

E. B. B.

C. A.

1906

FEDERAL  
LIFE  
ASSURANCE  
CO. OF  
CANADA  
v.  
STINSON.

Meredith J.A.

C. A.

1906

Dec. 24.

[IN THE COURT OF APPEAL.]

KERSTEIN ET AL. V. COHEN ET AL.

*Trade Mark—Infringement—Coined Word—Similarity—Colourable  
Imitation—Costs.*

The judgment of Mulock, C.J. Ex.D., 11 O.L.R. 450, dismissing without costs an action to restrain the defendants from using the coined word "Sta-Zon" to describe their eye glasses, in alleged infringement of the plaintiffs' registered trade mark "Shur-On," was affirmed on appeal.

AN appeal by the plaintiffs from the judgment of Mulock, C.J. Ex. D., 11 O.L.R. 450, dismissing the action, which was brought to restrain the defendants from infringing the plaintiffs' trade mark "Shur-On," as applied to optical goods, by the use of the word "Sta-Zon," applied to similar optical goods, and to restrain the defendants from selling their optical goods under the name "Sta-Zon," for an account of profits, and for damages. The defendants, respondents, by way of cross-appeal submitted that the action should have been dismissed with costs.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A., on the 3rd and 4th October, 1906.

*J. A. Macintosh*, for the appellants. The questions raised by the appeal are : whether "Sta-Zon" is a colourable imitation of "Shur-On" and calculated to deceive the public into believing that in buying the respondents' goods they were getting the appellants' goods; and whether, apart from the technical question of trade mark, the respondents adopted the name "Sta-Zon" and advertised and sold their optical goods under that name with the intention of passing off their goods as the goods of the appellants. As found by the trial Judge, the trade mark of the appellants is valid, and the respondents are precluded by the former judgment between the parties from attacking in this action the validity of the appellants' trade mark. The evidence establishes that the respondents adopted "Sta-Zon" and used it as a trade mark with the intention of imitating the appellants' trade mark; that "Sta-Zon" is a colourable imitation of the appellants' trade mark; that the public have been deceived by the respondents' user of the word

"Sta-Zon" into buying goods of the respondents in the belief that they were purchasing the appellants' goods; that the user of the word "Sta-Zon" is likely to have that effect; that the respondents have adopted "Sta-Zon" and sold their goods under that name for the purpose, as found by the trial Judge, of acquiring the benefit of the market which the appellants have developed for their goods, and for the purpose of passing off on the public their goods as the goods of the appellants, and have so passed off their goods upon the public. He referred to *Taylor v. Taylor* (1854), 23 L.J.N.S. Ch. 255; *Johnston v. Orr Ewing* (1882), 7 App. Cas. 219; *Wother-spoon v. Currie* (1872), L.R. 5 H.L. 508; *Singer Manufacturing Co. v. Loog* (1882), 8 App. Cas. 15; *Leather Cloth Co. v. American Leather Cloth Co.* (1865), 11 Jur. N.S. 513, 35 L.J.N.S. Ch. 53, 11 H.L.C. 523; *In re Farina* (1879), 27 W.R. 456; *Little v. Kellam* (1900), 100 Fed. R. 353; *American Grocery Co. v. Sloan* (1895), 68 Fed. R. 539; *Vulcan v. Myers* (1893), 139 N.Y. 364; *Glen Cove Manufacturing Co. v. Ludeling* (1885), 22 Fed. R. 823; *Celluloid Manufacturing Co. v. Cellonite Manufacturing Co.* (1887), 32 Fed. R. 94; *Fox v. Glynn*, Supreme Court of Massachusetts, 3rd April, 1906, not yet reported.

*J. H. Moss* and *C. A. Moss*, for the respondents. The appellants have no right to pre-empt the meaning of this word as distinguished from its form; the same idea was in vogue much earlier; the word as regards its meaning was common property. The action is based solely upon an alleged infringement by the respondents of the appellants' trade mark; it is not in any sense a passing-off action. The appellants at the trial assumed the onus of satisfying the Court that the mere user by the respondents of their registered trade mark constituted a colourable imitation of the appellants' trade mark. The trial Judge held that the appellants had failed to satisfy this onus, and that is the only possible finding upon the evidence. There is no evidence upon which the Court can act either of any actual deceit or of any attempt to deceive the public. Dissociated from their meaning, the words comprising the two trade marks suggest to the eye and to the ear contrast rather than resemblance. Reference to cases cited by the trial Judge, and also to the following: *Jamieson v. Jamieson* (1898), 15 R.P.C. 169; *In re Talbot's Trade Mark* (1894), 11 R.P.C. 77; *In re Burgoyne's Trade Mark* (1889), 6 R.P.C. 227; *Meaby & Co.*

C. A.

1906

KERSTEIN

v.

COHEN.



C. A.  
1906  
KERSTEIN  
v.  
COHEN.

v. *Triticine Limited* (1897), 15 R.P.C. 1; *Coleman v. Brown* (1899), 16 R.P.C. 619; *Re Hedley's Trade Marks* (1900), 17 R.P.C. 719; *In re Horsburgh & Co.'s Application* (1878), 53 L.J.N.S. Ch. 237; *In re Leonard & Ellis's Trade Mark* (1884), 26 Ch.D. 288, 297; *Hubbuck v. Brown* (1899), 17 R.P.C. 148; *Mitchell v. Henry* (1880), 15 Ch.D. 181, 195, 196; *In re Palmer's Application* (1882), 21 Ch.D. 47; *Eastman Photographic Materials Co. v. Comptroller-General of Patents*, [1898] A.C. 571; *Lever v. Beddingfield* (1898), 16 R.P.C. 3; *Potter Drug and Chemical Corporation v. Pasfield Soap Co.* (1900), 102 Fed. R. 490; *Brennan v. Emery-Bird-Thayer Dry-Goods Co.* (1900), 99 Fed. R. 971; *Schendel v. Silver* (1892), 63 Hun 330. The ground stated by the trial Judge for depriving the respondents of the costs of the action is not supported by the evidence, and is not in law an adequate ground for withholding from the respondents the costs occasioned by the successful defence of an action which has been held to be unfounded. The trial Judge exercised his discretion upon a wrong principle, and the Court should remedy the wrong: *Civil Service Co-operative Society v. General Steam Navigation Co.*, [1903] 2 K.B. 756; *King v. Gillard*, [1905] 2 Ch. 7. We have the trial Judge's leave to appeal as to costs. There is nothing "unworthy" in attempting to get a market for your goods.

*Macintosh*, in reply, referred on the main appeal to *In re South American and Mexican Co.*, [1895] 1 Ch. 37; and on the question of costs, to *In re Gilbert* (1885), 28 Ch. D. 549.

December 24. OSLER, J.A.:—I agree in dismissing the appeal. To me the words, or distortions of words in common use, which the parties are disputing about are neither visually nor phonetically alike, though the idea intended to be conveyed by each may be the same.

MACLAREN, J.A.:—The plaintiffs have appealed from a judgment of Mulock, C.J., dismissing their action for an alleged infringement of their registered trade mark "Shur-On," which they had applied to optical goods manufactured by them.

The infringement complained of was by the use of the word "Sta-Zon," which the defendants applied to their optical goods of a similar character.

The plaintiffs' trade mark was registered in Canada on the 14th April, 1903, having been previously registered in the United States on the 28th July, 1902.

The plaintiffs had brought a previous action against the defendants for an infringement of their trade mark by the use of the word "Shur-On," and on 24th March, 1904, a consent judgment was rendered therein by which the defendants were "perpetually restrained from infringing the plaintiffs' trade mark in question in this action, by using the word 'Shur-On' in any way in connection with the sale or disposition of optical goods."

The defendants registered "Sta-Zon" as a trade mark on the 23rd November, 1904.

It is not necessary, in my opinion, for us, under the circumstances, to pass upon the validity or invalidity generally of either of these trade marks, or to consider how far the special requirements of sec. 64 of the Imperial Act of 1883, as amended in 1888, and the decisions thereunder, are applicable here under the more general language of our statute, R.S.O. 1886, ch. 63, secs. 3 and 12, inasmuch as we can dispose of the case on the question of infringement raised and discussed by the parties.

Under sec. 3 of our Trade Marks Act, a trade mark may be a "mark, name, brand, label, package or other business device," adopted and applied by any person to products or articles manufactured or sold by him.

In this case the trade mark in question is the hyphenated name or word "Shur-On."

Assuming that the plaintiffs have a valid trade mark, they have, by sec. 3 of the Act, the exclusive right to use the same, and by sec. 18 the right to maintain an action against any person using the "trade mark or any fraudulent imitation thereof."

Have the defendants interfered with such exclusive use, or been guilty of fraudulent imitation?

It is not pretended in this case that they have used the entire trade mark, but it is said they have taken its essential features, and have used a colourable or fraudulent imitation of it.

The learned Chief Justice who tried the case found that there was really no evidence to establish actual deception, and this part of his judgment was not complained of before us.

It only remains then to consider the two words themselves,

C. A.

1906

KERSTEIN

v.

COHEN.

Maclaren, J. A.

C. A.

1906

KERSTEIN

v.

COHEN.

Maclaren, J.A.

and I think the conclusion arrived at in the Court below is the proper one to be drawn from the examination or comparison.

The two appeals in such cases are to the eye and to the ear.

As to the former, it was not very strongly contended before us that there is any great similarity in appearance between the two words. And indeed it is only necessary to look at them, either together or separately, to see how essentially different they are in this respect. If the inventor of the second really intended an imitation of the first, he can scarcely be congratulated on his skill or the outcome of his attempt, so far at least as the appearance of the two words is concerned, in any imaginable kind of type or writing that could possibly be applied to the goods in question.

As to judging by the ear, I think the trial Judge was right in assuming that whether Shur-On be viewed as a compound word joined by a hyphen, or as a simple word of two syllables, separated by a hyphen, in either case the natural pronunciation and that adopted by nearly everybody would be that with a short u. If it is a simple word, every pronouncing dictionary would place the hyphen before the r to give a long sound to the vowel u. The ordinary pronunciation would perhaps suggest that the word might have some reference to the wilderness of Shur, through which the Children of Israel journeyed, rather than to the word "sure" as indicating the adhesive or staying qualities of the eye glasses to which it is applied.

But, even if the first part of Shur-On were pronounced like "sure," the sound of the two words would not be any nearer alike than if pronounced as it ordinarily would be, and the ear would not detect any similarity of sound or any suggestion of copying or imitation, fraudulent or otherwise.

But if the plaintiffs' claim is based not upon any similarity of the two words themselves as to sight or sound, but as to some quality of the goods more or less remotely indicated or to be inferred from the words used, or from the words of which they may be said to be a mis-spelling, then I think it is based upon a fallacy.

Under sec. 3 of the Act, it is the "marks, names, brands, labels, packages, or other devices," themselves, that are trade marks, and that must be infringed, copied, or imitated, in order to give a right of action, and not some idea or quality expressed or suggested by

them, and descriptive or of embodied in the goods to which they are to be applied.

If a person registers as a trade mark words that describe some quality in the class of goods to which he applies them, he does not thereby acquire the right to object to the application by others of synonymous words expressive of like qualities existing in their goods.

A like rule applies to marks or brands. If, for example, the figure of a horse's head was registered as a trade mark for horse food or medicine, it could hardly be said to be infringed by the figure of a horse's tail, although both figures would naturally suggest the idea of a horse.

We were not referred to any case, nor have I been able to find one, in which it was held that a trade mark composed of words or figures was infringed by other words or figures bearing no resemblance to them, merely because the latter described a quality or suggested an idea which also existed in the goods to which the latter were applied.

For a full discussion and statement of our law where words in trade marks more or less descriptive of the goods to which they were applied were in question, see the recent cases of *Provident Chemical Works v. Canada Chemical Co.* (1902), 4 O.L.R. 545, and *Gillett v. Lumsden* (1904), 8 O.L.R. 168.

I am therefore of opinion that the plaintiffs' appeal should be dismissed with costs.

The defendants have, on leave obtained from the trial Judge, brought a cross-appeal from that part of his judgment which dismissed plaintiffs' action without costs. This was a matter within his discretion, and an appellate Court should not interfere with its exercise unless he acted on a wrong principle. There was evidence before him on which he based his exercise of discretion, and I do not think we should now interfere with it. The cross-appeal also is dismissed with costs.

MOSS, C.J.O., and GARROW, J.A., concurred.

MEREDITH, J.A.:—If this case had been tried before me, I would unhesitatingly have found the defendants guilty: (1) of unfair competition, that is, of attempting to pass off their goods under

C. A.

1906

KERSTEIN

v.

COHEN.

Maclaren, J.A.



C A.

1906

KERSTEIN

v.

COHEN.

Meredith, J.A.

the guise of those of the plaintiffs; and (2) of a colourable imitation of the plaintiffs' registered trade mark.

The learned trial Judge found, and, in my opinion, almost necessarily found, that the defendants adopted their trade mark with the unworthy object of acquiring the benefit of the market which the plaintiffs had developed for their goods. How could such an object be unworthily obtained but by in some sense passing off their goods as those of the plaintiffs? It necessarily follows, in the practical result, that the defendants were guilty of unfair competition, but it does not necessarily follow that their registered trade mark is an infringement of the plaintiffs', though it bears upon that question, for one who endeavours to sail close to the wind of wrong is very apt to go over the line; and cannot complain if there be no leaning in his favour upon any doubtful question of fact.

The circumstances of the case start with a bold and unquestioned infringement by the defendants, and a judgment of the Court, made upon the consent of the defendants, perpetually enjoining them from that infringement. During the prosecution of the action which ended in that judgment, the defendants, in a letter to the plaintiffs, dealing with the subject, said: "The use of the word Shur-On at the present time will be of great value to us and would be very useful to you." That action was commenced on the 16th April, 1903, and the judgment is dated the 24th March, 1904. The defendants procured the registration of their trade mark in the next following month of November—the 23rd November, 1904.

Instead of the thousand and one other at least just as good trade marks which the defendants might have chosen, they "unworthily," as the trial Judge put it—dishonestly, as I would put it—chose that in question. What other object could they have had than to obtain, to abstract, from the plaintiffs, custom which otherwise would go to the latter; and how could that be brought about, in any practical and substantial sense, except by confusion of the goods of the defendants, in the minds of purchasers, with those of the plaintiffs, by reason of the similarity of the trade names applied to them? I decline to draw fine distinctions in favour of persons having unfair intentions and objects. Whether the defendants' eye glass frame is as good as, or even better than, the plaintiffs', is, in no sense, a conclusive question, it is but one of the circumstances of the case; it is by no means always the case that the

better article has the better sale. Advertising has much to do with the demand; and so too have other circumstances. It is by no means an inconceivable thing that the maker of the better article should be covetous of the trade of the maker of a worse one. It is not necessary to find which was the better in this case; there can be no manner of doubt of the defendants' covetousness in respect of the plaintiffs' trade, and their purpose "unworthily" to take advantage of it: see *Wotherspoon v. Currie*, L.R. 5 H.L. 508, at p. 515.

I cannot but think that the question of infringement is very often approached in the wrong way. It is a very unfair test to place the trade marks side by side and pore over them for days or hours with the aid of a magnifying glass, having their minutest differences equally magnified in our senses of hearing by ingenious and persuasive counsel. After an argument of such a case as this in this Court, one is very apt to feel that the differences in the marks are so indelibly impressed upon our minds that through life there is no danger of confusion or mistake on our parts; and yet I am quite satisfied that in six months' time some of us at all events would feel some confusion and prove not very hard to deceive if desiring to purchase either one of the frames in question. Nor can I in the least doubt that if any of us had been recommended to buy the Shur-On, and had twenty-four hours afterward gone to purchase it, having heard nothing of the Sta-Zon, and had been offered the latter, he would have taken it in the fullest confidence for the other. At best memory is treacherous; and when one has no knowledge of the danger of getting Sta-Zon for Shur-On, or *vice versa*, memory is not put to its best; it goes with the general impression of something that will hold firmly on, and soon the name is forgotten, and the best that the innocent purchaser can do is to indicate that that which he has been ordered to get has a name indicating that it will remain on; and so, when presented with either, of course not both, for no one is likely to sell both, he is quite satisfied with it. We have to remember what purchasers are likely to do; not purchasers who know all about this litigation, or that there are two different articles with similar names, but the purchaser who may have read the plaintiffs' advertisement and have made up his mind to buy their frame, or who has been recommended either by oculist, friend, or acquaintance to buy it, and

C. A.

1906

KERSTEIN

v.

COHEN.

Meredith, J.A.

C. A.

1906

KERSTEIN

v.

COHEN.

Meredith, J.A.

intends to do so, and has only his memory to go upon, and that without any knowledge of the defendants' similar frame and trade mark: see *Seixo v. Provezende* (1866), L.R. 1 Ch. 192, at p. 196; and *Johnston v. Orr Ewing*, 7 App. Cas. 219.

The learned trial Judge has gone to considerable trouble to quote the language of several Judges indicating that the question is not what ignorant or careless purchasers might do, but what persons taking some care would do. It would be very easy to quote very much which might seem to indicate the opposite of that, for instance, the observations of Lord Blackburn in the House of Lords in the *Orr Ewing* case, 7 App. Cas. 219, at p. 229: "And it could be no answer that the purchasers, so deceived, were incautious; the loss to the plaintiffs of the custom of an incautious purchaser is as great a damage as the loss of that of a cautious one." See also *Wotherspoon v. Currie*, L.R. 5 H.L. 508, part of the head-note of which is: "It is not necessary, however, to shew an exact resemblance between the original and the counterfeit—it is sufficient if there is such a resemblance as will mislead an unwary purchaser." But nothing is really gained by such quotations on one side or the other; they are of little true assistance unless read in the light of all the circumstances of the case in which they were expressed. In truth what is likely to happen as to all sorts and conditions of purchasers may be taken into consideration.

The fact that particular instances of confusion and deception were not proved is a circumstance to be taken into consideration, but is by no means conclusive in any case. In this case it does appear that a Sta-Zon frame was actually sent to the plaintiffs for repair in mistake for one of their own, which circumstance seems to have first brought to their knowledge the fact of the defendants' imitation of their trade mark methods. So, too, when the plaintiffs at the trial sought to give evidence of this character, it was rejected on the defendants' objection; though at the close of the trial on the next day the learned trial Judge expressed his willingness to reconsider any question of exclusion of evidence, which counsel on both sides declined. It is obviously a matter of considerable difficulty for a plaintiff to procure evidence of that character; the knowledge would lie mainly with the other side. The plaintiffs' agents would not sell the defendants' goods, either by mistake or designedly, for those of the plaintiffs.



If words in common use could be appropriated as these parties have appropriated them, sight and sound would not be the only channel through which deceit could be practised or mistake made; similarity of meaning would be quite as dangerous as either—if, indeed, not more dangerous than both combined. For a rough, off-hand illustration let me ask: if one should appropriate the common word, Hurrah, as a trade mark, and another should afterwards adopt a mis-spelling of it, which is not infrequently seen, Hooray, and should further disguise it by spelling it, Whoray—another shape in which it is sometimes seen—could there be any sort of doubt of the last being a dangerous imitation of the first, not because of either eye or ear being deceived, but because of their precisely similar cheer-full meaning? Change Hurrah by the alteration of even a single letter—for instance, change it to Darrah—and all similarity and danger of deception are gone, though in appearance and sound the words remain quite as much alike as before; but, the meaning being changed, all similitude is gone; one is more inclined to ask what sort of an Eastern word is Darrah, and what sort of an Australian or African bird or beast is the Who-ray? Even the meaning of Hurrah, reflected upon Who-ray through Hooray, goes completely with the change of one letter. When “fancy” words are used—words which may be rightly used—sight and sound only are concerned, for they have no common meaning until, by use as a trade mark, they acquire a meaning similar to the name or coat-of-arms of those who use them, in respect of goods made or sold by them.

It is not the mere design, or the mere words, which is or are to be looked at; all the circumstances of the case are to be considered. Here in both cases the words were used in respect of a similar device; to the ordinary purchaser the frames were alike; each word had the same meaning and the same purpose, namely, that the frames when placed upon the nose would remain there, would stay on; in both cases the supposedly humorous and phonetic distorted orthography, so much in vogue in these days, was adopted. There was complete likeness in all things except that Staz was inserted for Shur. Is it not the clearest kind of case of a colourable variation, which only the more proves the intention to do wrong? see *Wotherspoon v. Currie*, L.R. 5 H.L. 508, and *Johnston v. Orr Ewing*, 7 App. Cas. 219. The more catching part of each word—the rhyme—

C. A.

1906

KERSTEIN

v.

COHEN.

Meredith, J.A.



C. A.  
1906

KERSTEIN

v.

COHEN.

Meredith, J.A.

is the same. To borrow an expression of a learned Judge, they both play the same tune, and I may add play for the same purpose and in the same way.

And so I am unable to agree with the learned trial Judge on this question; but upon another ground am of opinion that the plaintiffs' action fails.

The trade mark of each of the parties is composed of two ordinary words in constant use by all those who speak the English language:—sure on, and stays on; a combination of illiterate and supposedly humorous mis-spelling does not alter them; they are both used to indicate the character of the article to which they are applied, and each does so effectually. To those who are familiar with the misuses of the word "sure" on this continent, the appropriateness of sure on is quite as great as that of stays on. If, for instance, (to indicate the wide uses of the word sure) we ask whether such a road leads to Washington, in many cases the affirmative answer will be neither "it is" nor "yes," but will be "sure;" and so, too, of almost any other question, whether or not it is intended as an abbreviation of the word assuredly, it is "sure." These facts shew that the words cannot be the subject of a valid trade mark; no one can rightly appropriate them to his own use; nor can he any the more do so by merely mis-spelling them and joining them with a hyphen. No one can rightly be deprived of the use of such words to describe his goods.

The fact that neither of the parties have raised this question, because it would be against their interests to do so; because, as the matter now stands, they would much prefer an implied affirmance of the validity of one or both of the trade marks by an adjudication in this Court treating them as valid, is no sort of reason why the Court should not consider whether in truth either party has any trade mark right in respect of which an action would lie.

I would dismiss the appeal and the cross-appeal.

*Appeal and cross-appeal both dismissed with costs.*

E. B. B.

[RIDDELL, J.]

1906

Nov. 16.

## ZILLIAX V. INDEPENDENT ORDER OF FORESTERS.

*Benefit Society—Rights of Member—Action to Establish—Domestic Forum—  
Submission to Jurisdiction.*

An action to establish the right of a person to membership in a benefit society will not be entertained by the Court, even where the society submits to the jurisdiction, until the remedies provided by the constitution of the society have been exhausted.

A dispute arose as to the plaintiff's right to continue to be a member of the defendant society, and a body of officials of the society decided against him; the plaintiff, instead of appealing to the Grand Lodge, as permitted by the constitution (by which he was admittedly bound), brought an action against the society. The action was dismissed, but without costs, and without prejudice to any other action being brought after the remedies provided by the constitution should be exhausted.

THIS was an action brought by George Zilliax the younger against the Independent Order of Foresters, a fraternal society doing an insurance business within the Province of Ontario.

The plaintiff alleged that in June, 1901, he made application to be admitted as a beneficiary member of Court Listowel, a subordinate court of the defendant society, and his application was accepted, and he became a beneficiary member; that at the time of his application he applied for an insurance of \$1,000 on his life in the defendant society, and his application was accepted, and a benefit certificate issued, whereby the defendants agreed that, in consideration of certain provisos and of the payment of such dues or assessments as might be imposed by the defendants, they would, on the death of the plaintiff, pay to his wife the sum of \$1,000; that the plaintiff had complied with all the provisos of the benefit certificate, and had paid all dues or assessments imposed on him by the defendants up to the time of the refusal of the defendants to accept further dues; that in or about May, 1906, the defendants refused to accept further dues or assessments from the plaintiff, and the plaintiff was expelled as a beneficiary member of the defendant society; that by reason of the acceptance by the defendants of the plaintiff's application, he had refrained from applying for other insurance, and was now not in a position to secure insurance as advantageously as when his application was accepted by the

Riddell, J.  
ZILLIAX  
v.  
INDEPENDENT  
ORDER OF  
FORESTERS.

defendants; and that the plaintiff had complied with all the rules of the defendants.

The plaintiff claimed to be re-instated as a beneficiary member of the defendant society, to have his benefit certificate declared to be in full force and effect, and in the alternative \$1,000 damages.

The defendants alleged that by his application for beneficiary membership in the defendant society the plaintiff stated his occupation to be a hardware merchant; that by the application he agreed to conform to and be governed and bound by the constitution and laws of the society, and that they should be a part of the contract, and that by a clause thereof, in force at the time of the application and still in force, "no person engaged in the manufacture or sale of intoxicating liquors is eligible for admission to membership in the Order, and any person engaging in the manufacture or sale of intoxicating liquors shall *ipso facto* forfeit his standing as a beneficiary member;" that it came to the knowledge of the defendants that the plaintiff was engaged in the sale of intoxicating liquors, within the meaning of the clause referred to, and that the plaintiff, pursuant to the provisions of the section, stood suspended from the society, and had forfeited his membership, and therefore the defendants refused to receive from the plaintiff any more dues or assessments in respect of such membership; that the forfeiture of the beneficiary membership of the plaintiff was brought about by his own act; and the defendants pleaded the statute of Canada 1 Edw. VII. ch. 100, sec. 5.

The plaintiff joined issue.

The action was tried before RIDDELL, J., without a jury, at Orangeville, on the 14th November, 1906.

It appeared that the plaintiff was engaged as clerk or assistant-manager of a hotel, and sometimes assisted in the bar-room, where intoxicating liquors were sold, that not being part of his regular duties.

It also appeared that the plaintiff had not appealed to the Grand Lodge of the defendant society from the decision with regard to his status, although he was entitled under the constitution and laws to an appeal.

C. R. McKeown, for the plaintiff.

W. H. Hunter, for the defendants.

November 16, 1906. RIDDELL, J.:—The plaintiff was a member of the Independent Order of Foresters, in the beneficiary or insurance branch. A dispute arising as to his right to continue to be such member, a body of officials of the Order decided against him. An appeal is provided by the constitution (by which the plaintiff is admittedly bound); such appeal being to the Grand Lodge. The plaintiff did not appeal, but, instead of appealing, brought this action for a declaration and other relief.

The defendants do not dispute the jurisdiction of the Court, but appear to be willing that the rights of the plaintiff should be determined in this action. Unless this position taken by the defendants makes a difference, I am bound to dismiss the action: *Essery v. Court Pride of the Dominion* (1882), 2 O.R. 596; *Dale v. Weston Lodge* (1897), 24 A.R. 351.

Does the submission of the defendants make any difference? I think not. Neither member nor "Order" can, I think, be permitted to make a court of justice a convenience for determining questions which ought to be disposed of in the domestic forum. And the maxim "*Boni judicis est ampliare jurisdictionem*" no more justifies the Court in reaching out for cases for decision than the other maxim "*Interest reipublicæ ut sit finis litium*" would justify the Court in preventing cases being brought or in refusing to decide them when properly brought.

The action, therefore, will be dismissed, but without prejudice to any other action being brought after the remedies provided by the constitution of the Order are exhausted. It is not a case for costs.

No doubt, a *modus vivendi* can be arrived at in the meantime, either by the plaintiff discontinuing the practice objected to, or by the defendants accepting the premiums without prejudice. It is eminently a case for an amicable arrangement.

I should add that in case it be considered that the merits of the dispute should be gone into, an appellate Court will be in as good a position as the trial Judge for determining these. The facts of the plaintiffs' employment, as stated by himself, are admitted by the defendants, and no question of credibility of witnesses can arise.

Riddell, J.  
ZILLIAX  
v.  
INDEPENDENT  
ORDER OF  
FORESTERS.



D. C.

1906

Oct. 12.

Dec. 7.

[DIVISIONAL COURT.]

GUNN V. TURNER.

*Vendor and Purchaser—Contract for Sale of Land—Specific Performance—Title—Recital in Deed More Than Twenty Years Old—Evidence—Onus of Proof—R.S.O. 1897, ch. 134, sec. 2 (1).*

A deed more than twenty years old, by which certain lands were conveyed to the grantee in fee, contained the recital that the grantee was the administrator of his father's estate, and that the land was conveyed to him in satisfaction and discharge of a debt due to his father. It appeared that some four years prior to the date of the deed letters of administration *ad litem* had been granted by a Surrogate Court to the father's widow. In an action brought for specific performance of a contract for the sale of the said land:—

*Held* that such recitals were sufficient evidence of the facts so recited, and were not displaced merely by the fact of the prior grant of administration to the widow for a stated limited purpose.

Judgment of Teetzel, J., at the trial, affirmed.

THIS was an appeal from the judgment of Teetzel, J., at the trial dismissing the action for specific performance of an agreement for the sale of certain lands, with costs.

The action was tried at Toronto on October 12th, 1906.

*D. L. McCarthy*, for the plaintiff.

*C. H. Ritchie*, K.C., and *A. Hoskin*, K.C., for the defendant.

The agreement was dated 9th of April, 1906, made between the plaintiff and defendant, whereby the defendant agreed to sell and the plaintiff to purchase certain lands set out in the agreement.

In the examination of the title to the property, the defendant produced a deed, dated 27th of January, 1864, made, "in pursuance of the Act to Facilitate Conveyances of Real Property," between John Cameron and Hector Cameron, both of the city of Toronto in the county of York and Province of Canada, Esquires, of the first part; Robert John Turner, of the same city, Esquire, of the second part; and Ramsay Crooks, of the city of New York, in the United States of America, Esquire, of the third part.

The deed recited: "That by a certain indenture, bearing date on or about the 17th July, 1854, and made between the said Robert John Turner and Nina Dorothea, his wife, of the first part, and the said John Cameron and Hector Cameron of the second part, the

several tracts or parcels of land and hereditaments hereinafter conveyed, being parcel of the lands and hereditaments therein described" (and of which the lands and premises in this action formed part), "were duly granted, bargained, sold, and conveyed unto and to the use of, the said John Cameron and Hector Cameron and their heirs.

"To hold the same for them, their heirs and assigns forever, upon trust to dispose of the said lands and hereditaments, and to apply the proceeds arising from such sale in payment of certain debts due and owing to certain parties in the schedule to the said indenture mentioned, and, amongst others, of a debt amounting to £507 7s., besides costs, due to one Ramsay Crooks, deceased, upon a judgment recovered by him against the said Robert John Turner in Her Majesty's Court of Queen's Bench of Upper Canada;" that "the said Ramsay Crooks departed this life some time since, and that the said Ramsay Crooks, party hereto, is the administrator of his goods, chattels and effects; that the said debts so due to the said Ramsay Crooks now amounts, with interest and costs, to the sum of £929;" that "the said Ramsay Crooks, party hereto, has agreed to accept and take a conveyance of the lands and hereditaments, hereinafter described, in full satisfaction and discharge of the same debt, and it has been agreed between the parties hereto that the same shall be conveyed to him in the manner hereinafter contained.

"Now this indenture witnesseth that in pursuance of the said agreement, and for the considerations hereinbefore contained, and for and in consideration of the said sum of £929, so due and owing to him the said Ramsay Crooks, party hereto, administrator as aforesaid, and for and in consideration of the sum of five shillings apiece, of lawful money of Canada, to each of them, the said John Cameron and Hector Cameron and Robert John Turner, at or immediately before the execution of these presents, in hand well and truly paid by the said Ramsay Crooks, party hereto, the receipt whereof they do hereby respectively acknowledge, they, the said John Cameron and Hector Cameron, at the request and with the consent of the said Robert John Turner, testified by his being a party to and executing these presents, have, and each of them, hath granted, bargained, sold, aliened, released, conveyed and confirmed, and by these presents do and each of them, doth grant,

D. C.  
1906  
GUNN  
v.  
TURNER.

D. C.  
1906  
GUNN  
v.  
TURNER.

bargain, sell, alien, release, convey and confirm, unto the said Ramsay Crooks, party hereto, his heirs and assigns, all and singular those certain parcels or tracts of land and premises," etc., setting them out.

"To have and to hold unto the said Ramsay Crooks, party hereto, his heirs and assigns, to and for his and their sole and only use for ever, subject nevertheless to the reservations, limitations, provisoes and conditions expressed in the original grant thereof from the Crown."

By a deed, also in evidence, dated the 17th December, 1866, made "in pursuance of the Act respecting Short Forms of Conveyances," between the said Ramsay Crooks, of the said city of New York, of the first part, and Frank Edward Price Turner, of the said city of Toronto, of the second part:

It was witnessed, "that in consideration of the sum of £929 of lawful money of Canada, now paid by the said party of the second part to the said party of the first part (the receipt whereof is hereby by him acknowledged), he, the said party of the first part, doth grant unto the said party of the second part, his heirs and assigns forever, all and singular," etc., describing the said lands.

"To have and to hold unto the said party of the second part, his heirs and assigns, to and for his and their sole and only use forever, subject," etc.

The plaintiff produced and put in evidence letters of administration *ad litem* granted by the surrogate court of the county of York on the 29th of March, 1860, to Emilie Crooks, of the said city of New York, of all and singular the personal estate and effects, rights and credits, of the said Ramsay Crooks, late of the said city of New York, who died at the said city of New York.

The plaintiff served a requisition on the defendant, claiming that under the said deed of 27th of January, 1864, Ramsay Crooks took the fee in the land, and therefore if married, his wife would be entitled to dower, and asking that proof should be furnished either that he was unmarried at the time, or that a release of dower should be procured.

The defendant replied that the said Ramsay only took in a representative character, and that therefore no dower attached; and that, in any event, a good possessory title had been shewn; that if the plaintiff was not willing to accept the title as it stood,

the agreement must be considered at an end. This action was thereupon brought by the plaintiff.

At the conclusion of the evidence the learned Judge delivered the following judgment.

October 12. TEETZEL, J.:—It seems to me that in the light of the recitals, the deed of 27th of January, 1864, from Cameron and Turner to Ramsay Crooks, was simply a conveyance to Ramsay Crooks of the property therein described for the benefit of his father's estate, and that the consideration for it was expressly a debt which was owing to his father's estate by the late Mr. Turner. The deed recites that his father, Ramsay Crooks, departed this life some time since, and that the said Ramsay Crooks, the party of the second part, is the administrator of his goods, chattels and effects. That follows the recital of a debt to Ramsay Crooks, senior, by Turner, the amount of which debt is £929. It appears as a fact that Ramsay Crooks, the vendor, was not the administrator appointed by the surrogate court of the county of York, his mother having been appointed administratrix in 1859, some five years before the date of this conveyance. I think, however, as against Ramsay Crooks, and those claiming under him through this conveyance, that he and they would be estopped from contending that the granting of that conveyance to him was not as the administrator of the late Ramsay Crooks, and that the consideration for the conveyance was not a part of the estate of the late Ramsay Crooks, assumed to be controlled by him as such administrator. He was apparently in the position of an administrator *de son tort*, and, as against himself and those claiming under him, his acts as such would have the same consequences as if he had been regularly appointed. In this conveyance he agrees to take the conveyance of the lands described in full satisfaction and discharge of the said debt, which he held as administrator, and I think what was given him in satisfaction and discharge of the debt (that is, the land in question), must be taken to be affected by the same trusts which marked the consideration which he gave for it, and that in an action by the representatives of his father's estate he would be held to be clearly a trustee for this property for his father's estate, without anything further being shewn against him than the recitals referred to. In

D. C.

1906

GUNN

v.

TURNER.

Teetzel, J.



D. C.  
1906  
GUNN  
v.  
TURNER.  
Teetzel, J.

that view, as a trustee, his widow, if he had one, would not be entitled to dower. I therefore think the vendor can make a good title. The defendant has not been in default, and this action, I think, should not have been brought, but, the defendant not objecting to specifically performing the contract, judgment may be entered accordingly, also declaring that the title is a good and valid title, and must be accepted by the plaintiff. I think the plaintiff should have applied to the Court under the Vendors and Purchasers Act R.S.O. 1897, ch. 134, instead of coming here, and, therefore the plaintiff should at least pay to the defendant the difference between costs of an action and the cost of proceedings under the Vendors and Purchasers Act, which I fix at \$50. No other order as to costs.

From this judgment the plaintiff appealed to a Divisional Court.

On December 6th the appeal was argued before BOYD, C., MAGEE, and MABEE, JJ.

*H. S. Osler*, K.C., for the appellant. The production of the letters of administration *ad litem* to Emilie Crooks displaces the *prima facie* proof raised by the statute of Ramsay Crooks, the son, being administrator of his father. The learned trial Judge seemed to think he might be treated as an administrator *de son tort*, but in the face of the evidence produced he cannot be so treated. Ramsay Crooks therefore took the fee in his own right, so that the question of dower properly arises. The plaintiff was driven to an action, because the defendant refused to do anything, and insisted upon his right to put an end to the contract.

*C. H. Ritchie*, K.C., and *A. Hoskin*, K.C., for the respondent. The defendant made every effort to discover the whereabouts of Ramsay Crooks, if still alive, and whether he had been married, but was unable to do so. Under these circumstances it was pointed out to the plaintiff that either he must take the title as it stood or the contract would have to be at an end. There is nothing, however, in the point raised. Under the deed it is quite clear that Ramsay Crooks was only dealing with the property in a representative capacity. Apart altogether from the statute, he would be estopped from setting up any personal right and his widow, if any, would be likewise estopped: *Doe d. Leeming v. Skirrow*

(1837), 2 N. & P. 123; *Potter v. Potter* (1841), 1 Rh. Id. 43, 46; Elphinstone on Deeds (1885), 133-4, 140. The recitals in the deed being more than twenty years old, are, under the statute, sufficient evidence of the truth of the matters stated therein, subject to be rebutted by evidence shewing them to be incorrect: R.S.O. 1897, ch. 134, sec. 2, sub-secs. 1, 3. The onus of doing so was on the plaintiff, and he has failed to do so. The learned trial Judge therefore properly found for the defendant.

December 7. The judgment of the Court was delivered by BOYD, C.:—Recitals in deeds twenty years old shall be taken to be sufficient evidence of the truth of the matter therein, unless and except in so far as they are proved to be incorrect: R.S.O. 1897, ch. 134, sec. 2 (1). By sec. 3 the rule is extended to actions, and the evidence of the recital which is declared to be sufficient as between vendor and purchaser shall be *primâ facie* sufficient for the purposes of the action.

There is no evidence herein given to displace the statement in the deed that the grantor was in 1864 administrator of his father's estate. The piece of evidence adduced that Mrs. Crooks was appointed administrator *ad litem* in 1860 for a limited purpose in Ontario does not prove the statement as to 1864 to be inaccurate or erroneous. The onus was on the purchaser to shew a different state of facts, and he has failed to do so.

I would affirm the decision with costs.

G. F. H.

D. C.  
1906  
GUNN  
v.  
TURNER.

1906

[MULOCK, C.J.Ex.D.]

Dec. 12.

## BIGGAR ET UX. V. TOWNSHIP OF CROWLAND.

*Highway—Obstruction—Municipal Corporation—Misfeasance—Liability for Wrongful Acts of Committee of Council—Injury to Traveller—Damages.*

The municipal council of a township, having decided to construct a ditch along a highway, under the provisions of the Ditches and Watercourses Act, appointed three of their number a committee to meet on the highway, and there to let the contract for the work by public competition. This the committee did, and, in order to indicate where the ditch was to be constructed, they drove stakes in the highway, one being near the centre of the travelled portion. The contract was let, and the stakes were left in position, projecting about six inches above the ground, and unprotected by barrier, light, or otherwise. One of the plaintiffs, in walking upon the highway, struck her foot against one of the stakes, and was thrown to the ground, and injured:—

*Held*, that the injury was caused by misfeasance, and that the municipal corporation were liable for the acts of the committee, who were acting within the scope of their authority.

Damages were assessed for the plaintiff who was injured at \$1,500 and for her husband at \$500.

THIS was an action for damages by John Biggar and Margaret Biggar, his wife, against the municipal corporation of the township of Crowland, for injuries caused to the plaintiff Margaret Biggar by certain obstructions on the highway. The facts are stated in the judgment.

The action was tried before MULOCK, C.J. Ex. D., at Welland; on the 22nd November, 1906.

*J. F. Gross*, for the plaintiffs.

*W. M. German*, K.C., for the defendants.

December 12. MULOCK, C.J.:—The facts are as follows. The municipal council decided to construct a ditch along the side line between the 8th and 9th concessions of the township of Crowland, under the provisions of the Ditches and Watercourses Act, and, their engineer having prepared the necessary plans and specifications and made the inquiries and award called for by the Act, the council appointed three of their number, namely, the reeve, Mr. Matthews, and councillors Carl and Misner, a committee to meet on the side road where the ditch was to be constructed, and there to let the

contract for the work by public competition. Accordingly this committee of council met officially at the appointed time and place, where were assembled a number of the public interested in the letting of the contract, and, in order to indicate to prospective contractors where the ditch was to be constructed, they drove four stakes in the highway, one, at least, and perhaps two, of these stakes being on the travelled portion of the road and very near to the centre; the others being nearer the side. They had with them the plans and specifications prepared by the engineer, and the reeve made the measurements shewing where the stakes were to be driven, and thereupon councillor Carl, with an axe, drove the stakes, at the places pointed out by the reeve. The latter testified that what they did was as a committee of the council; that they considered the placing of these stakes necessary in order to let the contract. Councillor Carl, one of the committee, was examined on behalf of the defendants, and stated that the stakes were driven into the road in order to indicate how much earth would be required to be removed. The contract was then let, and the stakes were left in position, projecting about six inches above the ground, and unprotected by barrier, light, or otherwise. In the dusk of the same evening Mrs. Biggar, with her son Bruce, was returning home, and, when walking along the travelled portion of the road, struck her foot against one of these stakes and was thrown to the ground and seriously injured. Feeling around with her hand, she found the stake, which could not be seen by a person standing up.

The evidence shews beyond doubt that the accident happened on the travelled part of the highway; that it was occasioned by the obstruction placed and left there by the committee of the council; that it was a dangerous obstruction; and that the defendants adopted no precautions in order to prevent injury to the public.

The plaintiffs' cause of action is framed at common law for misfeasance. The defendants seek to treat it as one under the statute for non-repair of the highway.

I am unable to regard it as a case of non-repair. At common law any obstruction which unnecessarily incommodes or impedes the lawful use of the highway by the public is a nuisance: Angell on Highways, sec. 223.

Mulock, C.J.

1906

BIGGAR

v.

TOWNSHIP

OF

CROWLAND.



Mulock, C.J.

1906

BIGGAR  
v.  
TOWNSHIP  
OF  
CROWLAND

It might have been lawful for the defendants to have left the stake in the highway if they had adopted proper precautions to prevent danger, as, for example, by protecting it with a light or by driving it so far into the ground that it could not cause injury, but it was unlawful for them to leave it in a condition that made it dangerous to the public: *Rowe v. Corporation of Leeds and Grenville* (1863), 13 C.P. 515; *Clemens v. Town of Berlin* (1904), 7 O.L.R. 33.

The defendants did not neglect any duty to repair. The injury was occasioned by no act of omission on the defendants' part to repair, but by an act of commission, the creating of a nuisance on the highway, which was in itself an unlawful act: *McDonald v. Dickenson* (1897), 24 A.R. 31, *per* Osler, J.A., at p. 43; *Gilchrist v. Township of Carden* (1876), 26 C.P. 1.

Placing an obstruction in the highway and leaving it so unguarded that it endangers the public safety is a nuisance for which an indictment lies, and also renders the guilty person liable to an action at the suit of an individual who has sustained special damage: *Borough of Bathurst v. Macpherson* (1879), 4 App. Cas. 256; *McKinnon v. Penson* (1853), 8 Ex. 319, 327.

If the municipality itself creates the nuisance, it is no more exempt from liability than an individual.

I therefore think that the accident in question was caused by misfeasance.

The next question is whether the defendants are liable for the act of the committee. Where members of a township council are appointed a committee to perform work for the council they are servants or agents of the corporation while in the performance of the work: *McDonald v. Dickenson*, *supra*.

The committee were authorized by the defendants to proceed to the place where the ditch was to be constructed, and there to let the work. It was in the interest of the defendants that the ditch should be constructed in the exact place selected for that purpose by the engineer. A disregard of such an important detail might seriously interfere with the efficiency of the work. I therefore think that for the information of tenderers and the guidance of the contractor and to secure the performance of the work in accordance with the plans and specifications, it was both proper and

necessary that the precise location of the proposed work should be marked out on the ground.

In arranging for the letting to be done on the spot where the work was to be performed, and appointing three of their number as agents of the corporation to attend on the spot to let the contract, it must be assumed, I think, that the council authorized the committee to do what seemed to them expedient in order to the letting of a contract according to the plans and specifications of the engineer and the decision of the council. Making intelligible to competitors the location of the proposed ditch was information reasonably necessary in order to the carrying out of the instructions of the council to let the contract, and thus for that purpose in planting the stakes the committee were acting in the course of and within the scope of their authority, and for their torts the defendants are liable: *Stalker v. Township of Dunwich* (1888), 15 O.R. 342; *Nevill v. Township of Ross* (1872), 22 C.P. 487; *Gilchrist v. Township of Carden*, *supra*; *Conrad v. Trustees of Village of Ithaca* (1857), 16 N.Y. 159, 161.

In *Bayley v. Manchester, etc., R.W. Co.* (1873), L.R. 8 C.P. 148, at p. 152, the Chief Baron says: "The principle to be deduced from the authorities on this subject is, that where a servant is acting within the scope of his employment, and in so acting does something negligent or wrongful, the employer is liable even though the acts done may be the very reverse of that which the servant was actually directed to do."

The question as to whether a servant or agent is acting within the scope of his employment or authority is one of fact, and no general rule can be formulated which will determine in each case whether the servant or agent was acting within the scope of his employment or authority, and Teetzel, J., in the unreported case of *Grimes v. City of Toronto*, expressed the view that if the servant is engaged to do work upon a highway, anything done by him in the course of that work or in furtherance of it, or anything omitted to be done that ought to have been done, speaking generally, will create a liability on the corporation.

Being of opinion that the defendants are liable for the injury sustained by the female plaintiff, the remaining question to determine is the amount of damages. Before the accident she was an able-bodied and remarkably healthy woman. Her age was

Mulock, C.J.

1906

BIGGAR

v.

TOWNSHIP

OF

CROWLAND.

Mulock, C.J.  
1906  
BIGGAR  
v.  
TOWNSHIP  
OF  
CROWLAND.

about 50. She gave evidence on her own behalf, and impressed me as a perfectly truthful and candid witness. The accident was a very serious one : two ribs were fractured, her left knee was injured, and she sustained serious internal injury, causing inflammation of the bladder and partial paralysis of the throat, accompanied by severe pain. She was confined to her bed for seven weeks.

None of the medical gentlemen who gave evidence spoke with any degree of confidence as to her ultimate recovery, and the reasonable inference is, I think, that there may be some improvement, but she will never recover the full use of her left leg, whilst there is a reasonable probability of permanent impairment of the knee-joint. At the time of the trial it was swollen, being about two inches larger than the sound one. Although seven months had elapsed since the accident, she was evidently in considerable pain, not only in the knee-joint, but in the left side of her body. She can move only with the help of a crutch, but on account of the pain in her left side she is obliged to use the crutch under the right arm, and to throw almost her whole weight over on the crutch in order to take a step forward with her right foot. Thus her body must lean out of the perpendicular and far to the right to enable her to lift her right foot off the ground.

From the evidence I entertain no doubt whatever as to the serious nature of the injury, and think it very problematical whether she will ever, even after considerable time, have a complete recovery. She has suffered very much and still suffers, and the accident has greatly impaired her general health. The plaintiffs are farm people in a respectable walk of life, and before the accident Mrs. Biggar was an active, industrious woman, a valuable helpmate to her husband. Now she is a charge on him. A grown-up daughter, who had been employed in a factory, has been brought home to wait on her mother. A considerable liability has already been incurred for medical attendance, and more doubtless will follow.

I award to the female plaintiff the sum of \$1,500 damages, and to her husband the sum of \$500, and direct judgment to be entered for the plaintiffs for these sums, with costs of the action.

E. B. B.

## [DIVISIONAL COURT.]

CRAWFORD V. TILDEN.

D. C.

1906

May 7.  
Nov. 5.*Constitutional Law—Mechanics' Lien Act—Railways—Dominion Act.*

The Mechanics' and Wage Earners' Lien Act, R.S.O. 1897, ch. 153, does not apply to a railway company incorporated under a Dominion Act and declared thereby to be a company incorporated for the general advantage of Canada.

THE plaintiff took proceedings under the Mechanics' Lien Act against Tilden & Co., M. A. Piggott & Co., and the Guelph and Goderich R.W. Co. to enforce a wage earner's lien, and the matter was heard before CLUTE, J., at the non-jury sittings at Goderich, on 7th May, 1906.

*E. L. Dickenson*, for the plaintiff.

*W. Proudfoot*, K.C., for the defendants M. A. Piggott & Co.

*A. H. Macdonald*, K.C., for the defendants the Guelph and Goderich R.W. Co.

The defendants Tilden & Co. appeared in person.

The work was done for Tilden & Co., who were sub-contractors under M. A. Piggott & Co., who had a contract for the earth work, cutting and grubbing, etc., required in the building of a portion of the railway within the county of Huron.

There were 100 similar liens which were brought before the Court by this action.

The liens were filed in the registry office of the county of Huron.

The Guelph and Goderich R.W. Co. was a company incorporated under the Dominion Act, 4 Edw. VII. ch. 81 (D.), and was declared to be a work for the general advantage of Canada. The charter was for the building of a line of railway from the city of Guelph to the town of Goderich, and which had been leased for a long term of years to the Canadian Pacific R.W. Co.

Piggott & Co. had been paid for the work done under their contract, except the 10 per cent. retained in the monthly certificates.

It was argued on behalf of the railway company that the company being a railway incorporated under a Dominion Act, and declared to be for the general advantage of Canada, was under the



D. C.  
1906  
CRAWFORD  
v.  
TILDEN.

exclusive jurisdiction of the Dominion, and therefore the "Mechanics' and Wage Earners' Lien Act," R.S.O. 1897, ch. 153, being a Provincial Act, did not apply to it.

The following judgment was delivered by the learned Judge.

May 7th, 1906. CLUTE, J.:—A preliminary objection has been made by Mr. McDonald, as counsel for the Guelph and Goderich R.W. Co., that this railway is a Dominion railway, under the exclusive jurisdiction of the Dominion Parliament, and that the Mechanics' Lien Act can have no application to a railway of this kind.

That has raised a very difficult question, and I am of the opinion that the objection at this stage is not well taken.

Section 52 of the Mechanics' Lien Act provides that the provisions of the Act, so far as they could affect railways under the control of the Dominion of Canada, are only intended to apply so far as the Legislature has jurisdiction thereto.

The Mechanics' Lien Act has relation not to railways, or any particular railway, whether under the Dominion or Provincial Act, but it has primarily relation to the collection of wages of workmen and incidentally as the Act now is, after the amendment, it now covers railways, and unless the objection here is well taken, it covers all railways. The lien which is spoken of is only one incident of the Act. Provision is made under the various sections of the Act for working out a claim in favour of the workmen—of the wage earner, by directing that a certain portion of the contract price, varying from fifteen to twenty per cent., according to the amount of the contract, be set apart as a special trust fund to meet the obligations of the contractor to his men. That is entirely apart from the manner of realizing the lien in case that is not done. It may be that there will be no necessity to proceed against the railway at all. It may be in the present case that this sum which has been contracted to be set apart, is set apart, and that the provisions of the Act may be entirely carried out according to its intent and meaning, that the necessity of sale of the lands at all will not be needed, and therefore in this limited sense the Ontario Legislature may well have authority to have enacted the various sections of the Mechanics' Lien Act to this extent.

I refer to the language of Lord Watson in the case of the *Attorney-General of Canada v. Attorney-General of Ontario*, [1898] A.C. 247, where he says: "In their Lordships' opinion these considerations must be borne in mind when interpreting the words 'bankruptcy' and 'insolvency' in the British North America Act. It appears to their Lordships that such provisions as are found in the enactment in question, relating as they do to assignments purely voluntary, do not infringe on the exclusive legislative power conferred upon the Dominion Parliament. They would observe that a system of bankruptcy legislation may frequently require various ancillary provisions for the purpose of preventing the scheme of the Act from being defeated. It may be necessary for this purpose to deal with the effect of executions and other matters which would otherwise be within the legislative competence of the Provincial Legislature. Their Lordships do not doubt that it would be open to the Dominion Parliament to deal with such matters as part of a bankruptcy law, and the Provincial Legislature would doubtless be then precluded from interfering with this legislation inasmuch as such interference would affect the bankruptcy law of the Dominion Parliament. But it does not follow that such subjects, as might properly be treated as ancillary to such a law and therefore within the powers of the Dominion Parliament, are excluded from the legislative authority of the Provincial Legislature when there is no bankruptcy or insolvency legislation of the Dominion Parliament in existence."

Now there can be no doubt in the present case that the collection of wages of employees is a matter of civil right within the jurisdiction of the Provincial Legislature. It is true that in enforcing that right under the Mechanics' Lien Act it may be necessary to reach property which is under the control of the Dominion Parliament and in such case, where the Dominion Government has not passed any Act making provision for the collection of any debts due to a workman from a Dominion railway, I think that the discretion referred to by Lord Watson is applicable to this case, and until there is such legislation, that the Provincial Legislature had power to pass the enactment they have passed.

But it is said, it is against public policy to sell a railway and that the amendment of the Mechanics' Lien Act which introduced the word "railway" did not alter the law in that regard. I am not

D.C.

1906

CRAWFORD

v.

TILDEN.

Clute, J.

D. C.  
1906  
CRAWFORD  
v.  
TILDEN.  
Clute, J.

of this opinion. I think the Dominion Railway Act, 1903, sec. 240, and the decisions in the case of *Redfield v. Corporation of Wickham* (1888), 13 App. Cas. 467, and *Canada Southern R.W. Co. v. Jackson* (1890), 17 S.C.R. 316, shew that a Dominion railway or a section of it may be sold. In other words, the highest court, the court of Parliament, has settled the rule in regard to selling the railway or a portion of it, for the satisfaction of a public debt. So also, *Wile v. Bruce Mines and Algoma R.W. Co.* (1906), 7 O.W.R. 157. Then without deciding, it may be said there is a further view to be considered according to the finding of the Master in respect of this land, that there may be no necessity for the sale at all. There may be ample funds set aside by the Act for the very purpose of meeting this claim. I feel that we may, at the present, assume there may be moneys, which may be reached by the appointment of a receiver or by sequestration upon the findings of the Master, so as to make it unnecessary to effect a sale.

At all events, I think the preliminary objection at this stage is not well taken, and the plaintiff may proceed with his evidence and shew that he is entitled to a lien.

At the conclusion of the case he further said:—

The plaintiff has made out a case for a reference in this matter to ascertain the amount due the plaintiff, and the amounts due other lien holders, and for a right to rank on the funds, pursuant to the Act, for the amount due by the owners. I refer it to the Master at Goderich, and the Master may take all necessary accounts, and make all necessary enquiries and report as to the liabilities of the defendants and each of them, and the various lien holders under the terms and pursuant to the Mechanics' Lien Act. Further directions and costs reserved, including the costs of the trial, when the Master shall make his report.

After some observations by counsel the learned Judge added:—

I intend that the Master should have the widest scope in making the enquiry as to the relation existing between these defendants and any one of them, as to the amount due by the one to the other that may be made applicable to the payment of these claims or any of them.

From this judgment the railway company appealed to a Divisional Court.

On October 11th, 1906, the appeal was heard before BOYD, C.,  
MAGEE, and MABEE, JJ.

D.C.

1906

CRAWFORD

v.

TILDEN.

*E. D. Armour*, K.C., for the appellants.

*E. L. Dickenson*, for the plaintiff, respondent.

*A. M. Stewart*, for the defendants Piggott & Co., respondents.

The arguments and authorities referred to sufficiently appear from the judgments.

November 5. BOYD, C.:—Apart from special statute, the law of Ontario still is that a railway as a going concern cannot be sold under execution by the sheriff unless he is able to sell the whole undertaking. It is not competent under judicial process of this kind to sell by piecemeal so as to disintegrate the road. That was recognized as the law by the Privy Council when deciding in *Redfield v. Corporation of Wickham*, 13 App. Cas. 467, at pp. 473, 5-6 that a railway undertaking might be as a whole sold under execution, according to the proper construction of the Dominion old law.

For like reasons that make against the sale of part of a railway under execution, it was held that a mechanics' lien against part of a railway could not be enforced in Ontario in *King v. Alford* (1885), 9 O.R. 643. And that was the state of the law when the Mechanics' Lien Act was amended by extending it in terms to railways. But the machinery supplied by the Act does not provide for working out a sale of the entire undertaking. The remedy seems to be restricted to that part of the railway where the work was done, and if the right of relief to the wage-earner in respect of his lien was analogous to that enjoyed by a vendor of land in right of the lien for the price, relief might be given and worked out by the Court under the provisions of the Provincial Act.

But we are precluded by the decision in *King v. Alford* from holding that the mechanics' lien is of like legal character with a vendor's lien. It was there held that the mechanics' lien was operative as a statutory lien arising in process of execution of efficiency equal to, but not greater than, that possessed by ordinary writs of execution.



D.C.  
1906  
CRAWFORD  
v.  
TILDEN.  
Boyd, C.

Under a writ of execution against lands the sheriff can only sell what is in his bailiwick and this limited process is not applicable to a sale of a line of railroad running through many counties of the Province.

Even if the mechanics' lien was to be regarded as a vendor's lien, I question the competence of the Province to put that burden upon the lands and property of a federal railway undertaking.

By Dominion statute 4 Edw. VII. ch. 81, the railway in question was incorporated and the undertaking was declared to be by sec. 11 a work for the general advantage of Canada. By the enactment it was brought within the exception as to the local works and undertaking specified in the British North America Act, sec. 92, sub-sec. 10 (c), and thereby placed under the exclusive legislative authority of Canada by virtue of sec. 91, sub-sec. 29. Being thus a federal railway exclusively under the legislative control of the Dominion, it is not competent for the local legislature of Ontario to enact any law which would derogate from the status and rights and property enjoyed and held by the federal corporation under its constitution created by the Dominion of Canada. That result follows inevitably, I think, from what has been decided in the earlier case of *Bourgoin v. La Compagnie du Chemin de fer de Montreal, Ottawa et Occidental R.W. Co.* (1880), 5 App. Cas. 381; and the more recent case of *Attorney-General of Canada v. Attorney-General of Ontario* [1898] A.C. 247; *Canadian Pacific R.W. Co. v. Notre Dame de Bonsecours*, [1899], A.C. 367; *Madden v. Nelson and Fort Sheppard R.W. Co.*, *ib.* 626.

The Mechanics' Lien Act of Ontario is extended to railway companies as owners and to railways and their lands with the safeguard in sec. 52. "The provisions of this Act so far as they affect railways under the control of the Dominion of Canada are only intended to apply so far as the Legislature of the Province has authority or jurisdiction in regard thereto." This was passed in 1886, after the decision in *King v. Alford* (1885).

The effect of the legislation is to operate at once upon the property of the railroad affecting it *in rem* and creating a statutory lien on the undertaking for the benefit of the wage earner. The initial proceedings under the Ontario Act is to place a burden on the lands of the railroad in addition to what may be imposed upon them under the Dominion Railway Act, secs. 111, 112,

etc., Act of 1903. That appears to me to be a piece of legislation beyond the competence of the Provincial Legislature.

I foresee besides great difficulty in working out the provisions of the Mechanics' Lien Act as applied even to Ontario railways under the existing law, which forbids the disposal of a railway piecemeal. To make the local law effective it would appear to be requisite to provide for a sale of the particular part of the land benefitted by the work in respect of which a lien is given. The Act as it stands at present can only be worked out by attributing the lien to all the line of railway lands and selling the whole as an entire thing while yet the lien is registered only in the county where the work has been done: sec. 17, sub-sec. 3, and sec. 7.

Upon the main point, however, as to the constitutional aspect of the Mechanics' Lien Act, I think the appeal should succeed. It is not a question for costs.

It was suggested, but not strongly argued, that there might be a difference when the federal railroad was not a completed and running concern, but only in course of construction. That, however, is not to my mind an essential difference; it is still a federal work entered upon and being prosecuted for the advantage of the whole Dominion, and it should not be frustrated or interfered with by Provincial legislation of the kind in question.

MABEE, J.:—The Guelph and Goderich R.W. Co., incorporated under 4 Edw. VII. ch. 81 (D.), is declared to be a work for the general advantage of Canada.

The plaintiff took proceedings under the Mechanics' Lien Act, and has a declaration that he is entitled to a lien, under that Act, upon the lands of the defendants the railway company, "in the county of Huron," and to a charge upon the amount directed by sec. 11 of the Act to be retained by the defendants Piggott & Co. and the railway company under the contracts in question, and a reference to the Master at Goderich to take accounts, etc. The proceedings were commenced by filing the lien in the registry office for the county of Huron, and then by service of statement of claim as the Act provides. The judgment, it will be observed, does not make provision for the sale of the lands covered by the lien, or of

D.C.

1906

CRAWFORD

v.

TILDEN.

Boyd, C.

D. C.

1906

CRAWFORD

v.

TILDEN.

Mabee, J.

the road as a whole, and it is contended that under this judgment declaring the lien upon the railway lands in Huron the whole line of railway running through several counties can, if necessary, be sold under the direction of the Master; this seems rather a startling proposition, but if the lien is to be of any avail to the plaintiff, it must be by sale of the road.

The cases of *King v. Alford*, 9 O.R. 643, and *Breeze v. Midland R.W. Co.* (1879), 26 Gr. 225, are authorities that the Mechanics' Lien Act, as it then stood, had no application to railways, but since these decisions the Act has been amended, and the question is whether this amendment has in any way advanced or enlarged the rights of persons seeking the aid of the Act to enforce their supposed liens against the undertakings of railways under the exclusive control of the Dominion Parliament.

The plaintiff's statement of claim asks relief only as to such lands of the railway company as are in the county of Huron. The company is authorized to construct a road running through several counties, and under the judgment in appeal it is difficult to see how, in any event, the Master could direct a sale of lands other than those upon which the lien was declared to exist, and it being clear that the railway could not be sold piecemeal, the learned counsel for the plaintiff contended that he was entitled to a declaration of lien upon the railway "in respect of which the work was performed," and the case was so argued. Under secs. 91 and 92 of the British North America Act, legislative jurisdiction over the railway is vested exclusively in the Dominion Parliament, and I do not think that the Legislature of Ontario has power to enact provisions providing for a lien of the sort mentioned in the Act attaching to the lands of this railway and for a sale of the railway in default of payment.

If the plaintiff had an execution in the hands of the sheriff of Huron he could not sell this railway either in whole or in part under that process.

The British Columbia Mechanics' Lien Act has been held inapplicable to a railway subject to Dominion jurisdiction: *Larsen v. Nelson and Fort Sheppard R.W. Co.* (1895), 4 B.C.R. 151.

I think the difficulties pointed out in *King v. Alford* still exist, and no reasons are apparent for supposing the Legislature intended aiming the amendment at railways not under their legislative control, as there are many railways that the Act might be operative as to, such as an electric or steam road operating in one county under an Ontario charter, or special Act of the Province.

I think the judgment must be set aside and the appeal allowed.

MAGEE, J., concurred.

G. F. H.

D. C.  
1906  
CRAWFORD  
v.  
TILDEN.  
Mabee, J.



## [DIVISIONAL COURT.]

D. C.

1907

EMPEY V. FICK ET AL.

Jan. 14.

*Parent and Child—Conveyance of Farm by Father to Daughters—Agreement for Maintenance—Action to Set Aside Transaction—Understanding and Capacity of Grantor—Lack of Independent Advice—Absence of Undue Influence.*

A farmer, 77 years old, conveyed his farm to two of his daughters, subject to a charge for the maintenance of himself and his wife and of a money payment to another daughter. The evidence shewed that he understood what he was doing and approved of it afterwards till his death, four years later. This action was brought by one of his sons, after his death, to set aside the conveyance to the defendants, the two daughters :—

*Held*, that the transaction was a righteous one, and that the conveyance, being executed voluntarily and deliberately, with knowledge of its nature and effect, should not be set aside; the advice of an independent solicitor or other person was not a *sine quâ non*, it appearing that the transaction was not promoted or obtained by undue influence, and was in itself a reasonable one, having regard to all the circumstances.

Judgment of Clute, J., reversed.

AN appeal by the defendants from the judgment of Clute, J., who tried the action without a jury at Woodstock, in favour of the plaintiff.

The action was brought by a son of David Empey, deceased, to set aside a conveyance made by the deceased in 1901 to the defendants, two of his daughters, of a farm of one hundred acres, in the county of Oxford, in consideration of an agreement by the defendants for the maintenance of the grantor and his wife and the payment of \$200 to another daughter, and in consideration of past services. The facts are stated in the judgment.

The appeal was heard by a Divisional Court composed of BOYD, C., MACLAREN, J.A., and MABEE, J., on the 9th and 10th January, 1907.

W. M. Douglas, K.C., and W. C. Brown, for the defendants, contended that no fraud or misrepresentation being shewn, and there having been no coaxing on the part of the daughters, and no influence or dominion exerted by them, and the whole arrangement not being improvident, but the reverse, the case was brought within *Trusts and Guarantee Co. v. Hart* (1901-2), 2 O.L.R. 251, 32 S.C.R. 553. Upon the question of the testator's mental con-

dition and the value of medical evidence, they referred to *Russell v. Lefrançois* (1883), 8 S.C.R. 335.

*J. S. MacKay* and *R. McKay*, for the plaintiff. The deceased was out of his mind for a time and afterwards feeble-minded. The daughters were in a position to exercise influence—the relation was one of confidence. The farm was in effect a gift; the consideration amounts to nothing compared with the value of the land. They referred to *Mason v. Seney* (1865), 11 Gr. 447; *Dawson v. Dawson* (1866), 12 Gr. 278; *Beeman v. Knapp* (1867), 13 Gr. 398; *Lavin v. Lavin* (1882), 7 A.R. 197; *Dunlop v. Dunlop* (1884), 10 A.R. 670; *Cox v. Adams* (1904), 35 S.C.R. 393, and cases there cited.

*Douglas*, in reply. This is an executed agreement. The widow is still being supported under it, and the payment has been made to the third daughter. The situation is entirely different from that in any of the cases cited. There must be something more than the mere relationship of parent and child to establish the relation of confidence spoken of in the cases.

January 14. The judgment of the Court was delivered by *BOYD, C.*:—The transaction here impeached was substantially such a one as was under the consideration of the Court in *In re Johnson* (1881), 20 Ch.D. 389, where an aged and bed-ridden woman conveyed all her farm property to two daughters, who were to pay the debts in connection with the land, and to provide the mother during her life with a house, food, clothes, and medical or other attendance, in such a manner as she had been accustomed to. This was upheld as against creditors, and it was characterized by Mr. Justice Fry as “a perfectly honestly intended family arrangement:” p. 396.

The trial Judge in this case interfered, with reluctance, upon the ground that sufficient evidence was not given to support the transaction. He gives credit to the testimony of the daughters benefitted, and speaks of their demeanour in the witness box as “frank and fair,” but regrets that he feels compelled to set aside the conveyance. Though the case is very close to the boundary, I think what was done may be upheld without doing violence to any established rules.

D. C.

1907

EMPEY  
v.  
FICK.

D. C.  
1907  
EMPEY  
v.  
FICK.  
—  
Boyd, C.

The father was 81 when he died; when he made the disposition of his property in 1901, he was 77 years of age. The property conveyed was worth \$5,000, subject to a mortgage at first for \$1,600 and afterwards raised to \$2,500 in order to pay off debts and obligations by the daughters, and it was charged with the maintenance of father and mother during life, and also with a benefaction of \$200 to the youngest daughter Elva.

The father had sustained an injury by being thrown from a horse in 1895, and, though greatly prostrated physically and mentally for some months, he ultimately made a very fair recovery, and was restored to mental competence, so that he passed a successful examination on this head before two doctors, who examined him, at the request of his sons, in the spring of 1901. His physical condition induced him to give a power of attorney to his daughter Laura to transact his business—he could not be bothered with its details—and it was this which probably led to the sons making investigation as to his condition. The inquisition appears to have been very distasteful to the father. He spoke of it as a trouble and disturbance, that they were trying to drive him crazy, and take him away, and that they need never expect anything from him. The physicians who examined him in May, 1901, agree in the report (which is in writing) “that he is a man who understood right from wrong—somewhat defective memory, and that he could be easily influenced, but that he understands what he is doing and can so direct that his wishes may be properly carried out.” Dr. Welford, who was also examined for the plaintiff, supplements this by saying that he would not reply till he understood, and all his replies were in keeping with a man who understood; several of his replies smart and intelligent; they talked to him of selling and conveying land, and he quite understood about it. Asked as to management of the farm by his daughters, and whether he wished any change, and he said he was satisfied; “he knew almost to the number of the square feet of land he had . . . I think he would properly convey as a rational man would.”

The family physician was examined for the defence, and said that his mental condition was not impaired after that time and up till his death. This man, Dr. Lankester, says that the deceased would know property and what he was doing with it, that he would converse intelligently, and was competent to make a deed down

to the last. He does not agree with the opinion of Dr. Welford that he could be easily influenced; he was not easily influenced. In response to the Judge he says that in difficult matters, if the deceased was irritated or bothered to the point of nervous exhaustion, he might perhaps yield a point if severely pressed upon him, and might not be able to resist continued importunity. His senses were in good active condition, sight, speech, hearing. A fairly well educated man, who read a great deal, and was naturally of shrewd intelligence.

His general character was not changed after his recovery from the injury. He was described by one who knew him best—his wife—as a man who was always desirous to keep his word and promise—a man who would have his own way—one who was not to be coaxed or persuaded or influenced to do what he did not wish to do.

The result of the decision in appeal is to leave the property to be divided as upon an intestacy, and it certainly runs counter to the clear and frequently expressed wishes of the deceased. He said time and again and down to the time of the impeached transaction that he meant to give his property to those who took care of him, and that was his daughters, who lived with him to the end, and not to his sons, with whose conduct he was not satisfied (and probably not without good reason), as the evidence indicates, and the trial Judge comments upon. His expressed intention was not to make a will (as his wife tells us), and he well understood the effect of a deed as distinguished from a will.

The general intention as to the disposal of his farm seems to have taken more distinct form after the visit of the physicians in 1901, and in August of that year he spoke to his daughters and gave them to understand that papers might be prepared to secure the farm to them, and to him and his wife a comfortable home and support for the rest of their lives. As carried out in the documents impeached, the scheme does not appear to be improvident, but sensible and prudent—having regard to the fact that he knew his daughters well and had long lived with them upon satisfactory relations both as to the management of the place and in their personal care for the comfort of their parents. The daughters personally undertook to support the parents in a home upon the lands, and this was made an express charge upon the property. The deed was also given in consideration of past services which had been rendered

D. C.

1907

EMPEY

v.

FICK.

Boyd, C.



D. C.

1907

EMPEY

v.

FICK.

Boyd, C.

for many years without money compensation. The documents were prepared by one who had been solicitor for the father, and were laid in a place, to which the father had access, where such papers were kept. The papers were in accordance with his instructions, as the daughter says, and they were not signed for a considerable time after they were brought to the house. (The registration of them is in March, 1902). He had, therefore, plenty of leisure to consider them—had sufficient understanding to know their meaning and purport, and he was not solicited to execute them. That appears to have been done of his own motion voluntarily and deliberately; he appeared one day with them in the dining-room, bringing them in, and sitting down read them through, and then he and his wife signed their names in the presence of the hired man and one daughter—not the one who had brought the papers to the house. The other daughter coming in afterwards, all were signed in the presence of the same witness. The daughter says that the father suggested the gift to Elva of \$200, and this clause is written into the end of the typewritten agreement—though no evidence is given when it was added, but it was before execution, and is initialled by the witness. The contents and purport of these papers had been talked over shortly before signing between the father and mother and the two daughters. If it be that the old man was susceptible of being swayed by importunity, there is no evidence that any such pressure or solicitation was used in order to procure or induce his signature. The disposition of property was a reasonable one to make; it was entered upon without haste or secrecy or importunity—it was carried out in accordance with the often expressed intention of the father continued down to the time of its completion; and for four years thereafter the fruits of it were enjoyed by the parents without any evidence of discontent or dissatisfaction till the death of the father. Even now the mother adheres to and approves of the arrangement, which appears to have been disturbed without any adequate warning or notice given to her. She is not a party to the record—nor is the younger sister from whom the donation of \$200 has been taken *ex parte*.

The evidence satisfies me that the father understood what was being done, and approved of it afterwards till the day of his death. This is a fact of great significance, in the face of which the family arrangement should not lightly be disturbed. See

*Phillipson v. Kerry* (1863), 32 Beav. 628, 631. The tests which were laid down in *Cooke v. Lamotte* (1851), 15 Beav. 234, appear to my mind to co-exist in this case, *viz.*, that the transaction was righteous or just, and that the documents were executed voluntarily and deliberately with knowledge of their nature and effect.

The advice of an independent solicitor or other person is not a *sine quâ non*, if it is otherwise made to appear that the transaction was not promoted or obtained by undue influence, and is in itself a reasonable one, having regard to all the circumstances of the case.

My judgment would be to affirm the transaction, restore the deed, and agreement, and dismiss the action with costs.

E. B. B.

D. C.

1907

EMPEY

v.

FICK.

Boyd, C.

## [DIVISIONAL COURT.]

D. C.

ENGELAND ET AL. V. MITCHELL ET AL.

1907

Jan. 8.

*Discovery—Production of Books—Postponement—Profits of Business—Master and Servant Act, secs. 3, 4—Application to Contract Alleged—Statement of Profits—Right to Impeach.*

In an action to recover a share of the profits of a business under an alleged agreement to share profits, the plaintiffs sought discovery of the books of the defendant:—

*Held*, that the consideration of the matter should be postponed until it had been properly determined in the action, as a matter of law and not upon an interlocutory motion, first, whether the agreement alleged by the plaintiffs was within secs. 3 and 4 of the Master and Servant Act, R.S.O. 1897, ch. 157, and second, whether (if it was) the statement of profits declared by the defendant could be impeached for fraud, error, mistake, or other like cause.

*Cutten v. Mitchell* (1905), 10 O.L.R. 734, discussed.

APPEAL by the plaintiffs from an order of MEREDITH, C.J.C.P., in Chambers, dated the 11th December, 1906, allowing an appeal by the defendant Mitchell from an order of the local Judge at Guelph, in Chambers, whereby the defendant Mitchell was required to file a further and better affidavit on production of documents, producing the books and statements relating to the profits of the defendants' business in question in this action.

The action was brought by John Engeland and Lionel F. Cutten against John Mitchell and A. S. Foster for an account and payment of moneys.

By the statement of claim the plaintiffs alleged: (1) that the defendant Mitchell carried on at Guelph the business of a carriage goods manufacturer and a buyer and seller of supplies therefor, under the name of "The Guelph Carriage Top and Hardware Company;" (2) that in or about May, 1899, the plaintiffs and defendants entered into a joint oral agreement by which the plaintiffs and the defendant Foster were to assist the defendant Mitchell in his business from the 1st August, 1899, for an indefinite time, the capital to consist of the stock, plant, machinery, and other assets of the business of Mitchell and of the net profits arising from the business thereafter to be carried on, less certain fixed annual amounts, the net profits to be divided into 100 equal parts, the defendant Mitchell to be entitled to 40 parts, the defendant Foster to 25 parts, the plaintiff Cutten to 20 parts, and the plaintiff Enge-

land to 15 parts (and setting out further the terms of an agreement to share profits); (3) that the plaintiffs and the defendant Foster remained associated in the business with the defendant Mitchell from the 1st August, 1899, until the 1st August, 1905, in the case of Engeland, and until the 12th May, 1905, in the case of Cutten; (4) that on the 3rd January, 1906, the plaintiffs recovered a judgment in the High Court against the defendant Mitchell for \$4,751, as being their share of the net profits from the 1st August, 1899, to the 1st August, 1904, which amount had been paid to the plaintiffs by the defendant Mitchell; (5) that the plaintiffs had since the 1st August, 1905, made frequent applications to the defendant Mitchell for a statement of the net profits of the business from the 1st August, 1904, until the 1st August, 1905, but Mitchell had neglected or refused to deliver the same or allow the plaintiffs an inspection of the books of account, and he had not paid the plaintiffs anything on account of the net profits from the 1st August, 1904, except the annual payments provided for by the agreement, and the defendant Mitchell was still indebted to the plaintiffs in large sums of money, etc.

The defendants by their statement of defence denied the plaintiffs' allegations; said that if there was any such agreement as alleged by the plaintiffs, sec. 3 of the Act respecting Master and Servant, R.S.O. 1897, ch. 157, applied thereto; that they had furnished a statement or return of net profits pursuant to that Act; and they pleaded payment, and *res adjudicata* by the judgment in the former action.

The plaintiffs replied, *inter alia*, that the alleged statement or return of the net profits was false to the knowledge of the defendant Mitchell, and was made by him with intent to defraud the plaintiffs; that the agreement was not within the meaning and intent of the statute, and was not affected thereby.

The defendant Mitchell having objected to produce the books, etc., of his business, the local Judge ordered him to do so, and to make a better affidavit on production; but the order was set aside by Meredith, C.J., and the plaintiffs appealed, upon the following grounds:—

1. That the relationship existing between the parties was of a fiduciary character, agency and trusteeship.

D. C.

1907

ENGELAND

v.

MITCHELL.



D.C.

1907

ENGELAND

v.

MITCHELL.

2. That the Master and Servant Act applies to a bare debtor and creditor relation only, and does not apply to the contract set forth in the statement of claim.

3. That if the Act does apply, fraud is in issue, and the plaintiffs are entitled to discovery in respect thereof, the details being exclusively within the knowledge of the defendant Mitchell.

The action referred to in the pleadings was between the same parties. See *Cutten v. Mitchell* (1905), 10 O.L.R. 734—a report of the decisions upon an application and appeals similar to the present, with a note of the judgment given at the trial.

Sections 3 and 4 of the Act respecting Master and Servant, R.S.O. 1897, ch. 157, are as follows:—

3. It shall be lawful in any trade, calling, business, or employment, for an agreement to be entered into between the workman, servant, or other person employed, and the Master or employer, by which agreement a defined share in the annual or other net profits or proceeds of the trade or business carried on by such master or employer, may be allotted and paid to such workman, servant or person employed, in lieu of or in addition to his salary, wages, or other remuneration; and such agreement shall not create any relation in the nature of partnership, or any rights or liabilities of co-partners, any rule of law to the contrary notwithstanding; and any person in whose favour such agreement is made, shall have no right to examine into the accounts, or interfere in any way in the management or concerns of the trade, calling, or business in which he is employed under the said agreement or otherwise; and any periodical or other statement or return by the employer, of the net profits or proceeds of the said trade, calling, business, or employment, on which he declares and appropriates the share of profits payable under the said agreement, shall be final and conclusive between the parties thereto and all persons claiming under them respectively, and shall not be impeachable upon any ground whatever.

4. Every agreement of the nature mentioned in the last preceding section shall be deemed to be within the provisions of this Act, unless it purports to be excepted therefrom, or this may otherwise be inferred.

The appeal was heard by a Divisional Court composed of BOYD, C., MACLAREN, J.A., and MABEE, J., on the 7th January, 1907.

*W. H. Cutten*, for the plaintiffs, referred to *Cutten v. Mitchell*, 10 O.L.R. 734; *Sachs v. Speilman* (1887), 37 Ch.D. 295; *Waynes Merthyr Co. v. Radford*, [1896] 1 Ch. 29; *Leitch v. Abbott* (1886), 31 Ch.D. 374; *Whyte v. Ahrens* (1884), 26 Ch.D. 717.

*H. Guthrie*, K.C., for the defendant, cited Bicknell & Kappele's Practical Statutes, p. 311.

D. C.

1907

ENGELAND

v.

MITCHELL.

January 8. The judgment of the Court was delivered by BOYD, C.:—It is undesirable upon interlocutory applications, such as this in respect of an affidavit for better production, to decide the important questions of law which are raised upon the pleadings.

First, it is in dispute whether the verbal agreement alleged as to the sharing of profits is or is not within the scope of R.S.O. 1897, ch. 157, secs. 3 and 4. That matter has been apparently determined adversely to the plaintiff in the former action of *Cutten v. Mitchell*, 10 O.L.R. 734, upon the same agreement—but not, perhaps, so definitely as to amount to an estoppel or *res judicata*.

And again, if the agreement is covered by the statute, it is still questioned whether there is the right to investigate or impeach the statement of profits declared by the defendants by reason of the statute declaring that such statement is final and conclusive between the parties, and shall not be impeachable upon any ground whatever. It was thought by the Judge of first instance in the earlier action referred to, that the statement may be questioned on the ground of fraud, but the Divisional Court did not adopt that view of the law, and the point is still open for adjudication in a more satisfactory way, as upon a demurrer, than upon interlocutory motion.

In a case before me at London, *Formularo v. Forest City Laundry Co.* (p. 82, note book of 1906), I ruled off-hand that the statement might be attacked upon grounds of fraud or error, but upon appeal the Divisional Court (15th June, 1906), did not apparently accept that view, although giving leave to amend as the plaintiff might be advised. The plaintiff amended, I am told, by setting up fraud and mistake, and the case was tried out on these grounds—but without any profitable result. This case, therefore, is not binding upon us, and I now am not satisfied that my ruling can be main-

D. C.  
1907  
ENGELAND  
v.  
MITCHELL.  
Boyd, C.

tained in the face of the statutory language, to which my attention was not directed at London.

The question as to the conclusiveness of the statement was not discussed before us on this appeal it was perhaps not entered into by the appellants because their contention is that the statute does not apply to their contract. Both of these points of law should be decided not indirectly as on this point of practice, but should be raised so as to be capable of being determined by a Court of ultimate appeal, *i.e.*, presented and argued as matters of law upon the record.

My view is at present that the agreement is within the statute, and, if so, that a further and better affidavit should not be ordered as of course, even if at all. In my opinion, the better practice would be to let this matter of further discovery be held till the trial of the cause, and then such a course could be taken to ensure justice as is indicated in *Turner v. Bayley* (1864), 4 De G. J. & S. 332, and its sequel before the Master of the Rolls, as reported in (1864), 34 Beav. 105.

I would affirm the order of the Chief Justice with costs in the cause.

The brief result of this appeal is that further production is not absolutely denied, but the consideration of the matter is postponed till it has been properly determined in this action, first, whether the agreement set up is within the Ontario statute, and second, whether (if it is) the statement of profits declared by the defendants can be impeached for fraud, error, mistake, or other like cause.

E. B. B.

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## [DIVISIONAL COURT.]

GEORGE V. GREEN.

D. C.

1906

July 6.

Dec. 7.

*Judgment—Default of Appearance—Special Indorsement—Nullity—Irregularity—Account Stated—Interest on—Setting Aside Judgment—Terms—Signing and Entry of Judgments—Directing Issue—Judicature Act, secs. 113, 114—Con. Rules (1888) 245, 711, 764, 775; (1897) 138, 575, 628, 637.*

The claim for interest on an account stated was not a proper subject of special indorsement under Con. Rule 245 of 1888, and is not under the present Con. Rule 138, inasmuch as an account stated does not of itself entitle the creditor to interest. Interest is not chargeable upon such an account unless a fixed time for payment was agreed upon or a demand for payment was subsequently made, or upon an account indorsed shewing that the parties have themselves in adjusting their accounts allowed interest upon balances outstanding, though a jury might and probably would allow such interest as damages.

A judgment signed for default of appearance to a writ, the indorsement upon which is not a special indorsement authorized by the rules of Court, would be a nullity and not merely irregular, and susceptible of cure by amendment, but by virtue of Con. Rule 711 of 1888, and now of Con. Rule 575 of 1897, notwithstanding such a claim for interest, final judgment may be rightly signed for the liquidated demand upon the account stated, while as to the rest of the claim, the judgment should be interlocutory only; and if under these circumstances judgment for the whole claim has been entered, it is not a nullity but merely irregular, and terms may be rightly imposed on setting it aside:—

*Held*, also, that the requirements of Con. Rule 764 and 775 (1888) (*cf.* now, Con. Rules 628 and 637, 1897) as to the signing and entry of judgments, were satisfied by the proper officer placing his signature upon the back of the judgment under the words "judgment signed October 6th, 1890," followed by a memorandum in the judgment book in his office signed by him, although he did not sign the judgment on its face.

The propriety of directing that a question as to the validity of a default judgment impugned because of alleged defects in the indorsement of claim upon the writ should be determined by the trial of an issue is open to grave doubt.

THIS was an appeal from the judgment of BRITTON, J., delivered after trial of an issue without a jury at Pembroke.

The facts are fully stated in the judgments.

July 6. BRITTON, J.:—On July 30th, 1890, Wm. George caused a writ to be issued against P. J. Green. On October 6th, 1890, judgment was signed against Green for default of appearance for \$2,411.84 debt and \$23.63 taxed costs.

No execution issued at the time of signing judgment nor were there any further proceedings then taken against the judgment debtor.



D. C.  
1906  
GEORGE  
v.  
GREEN.  
—  
Britton, J.

Wm. George died on September 29th, 1904, and Mary George his widow, obtained letters of administration to his estate. On January 20th, 1906, Mary George, as administratrix, obtained an order directing that the suit be continued in her name as party plaintiff against P. J. Green as party defendant.

On January 25th, 1906, an order was obtained for the issue of an execution on said judgment, notwithstanding that six years had elapsed since said judgment. Execution was issued and a seizure was made thereunder. The sheriff of the district of Nipissing was appointed receiver to get in and receive any money coming to the defendant Green from or in respect of his interest in the south-east quarter of the north half of lot 14 in the 1st con. of Bucke in the district of Nipissing, to the extent of the plaintiff's judgment and costs.

The defendant Green applied to the Master in Chambers to set aside the writ of execution, the receiver order, the order of revivor, and the judgment, upon the following among other grounds, viz.:—

- (1) that he was never served with the writ of summons herein;
- (2) that judgment was never signed and entered herein;
- (3) that the said judgment, if signed, was obtained by misrepresentation as to the service of the writ of summons;
- (4) that the order of January 25th, 1906, was made *ex parte*;
- and
- (5) that the defendant has a good defence to the action on the merits.

Upon the return of the motion the learned Master directed an issue to be tried at the sittings of the Court to be holden at Pembroke on May 29th last. In the issue, P. J. Green was made plaintiff, and Mary George, administratrix, was made defendant, and the issue is "*whether or not the said P. J. Green is entitled to have the alleged judgment in this action set aside and vacated.*"

This issue was tried by me at Pembroke on May 30th, 1906. At the close of the evidence and argument I found the facts as follows:—

- (1) the writ of summons specially indorsed in form was personally served by Gideon Delahaye upon Green on July 31st, 1890;
- (2) that the alleged agreement on the part of George to give time to Green until he could pay the amount which Green owed to the firm of George & Green, and which Green assumed at the time

of the dissolution of the partnership, provided only that Green would pay in instalments of not less than \$25 a month, was not proved. I think there was required some additional material evidence corroborating Green as against the estate of Wm. George. The reasons for my findings were given to and taken down by the reporter, and will be found in his report of the trial.

D. C.  
1906  
GEORGE  
v.  
GREEN.  
Britton, J.

I now deal with the points reserved.

(1) Objection that judgment was never signed and entered herein.

Mr. Williams, a student in the office of the solicitors for George, on October 6th, 1890, attended at the office of the local registrar at Pembroke, searched for an appearance, and finding none, made an affidavit of non-appearance, filed same, together with a bill of costs which the local registrar taxed, and the original writ of summons, with an affidavit of personal service of a copy of it, and there was then written out the form of judgment as follows:—

(Style of cause:)

“The sixth day of October, A.D. 1890.

The defendant not having appeared to the writ of summons herein, it is this day adjudged that the plaintiff recover against the said defendant \$2,411.84 and \$23.63 costs.”

The local registrar did not on that day sign this paper on its face, but it was properly stamped, and indorsed upon it are the words:

“Minute of judgment.

Judgment signed 6th October, 1890.”

And this indorsement was duly signed:

“Arch. Thomson,

L. R. H. C. J.”

Mr. Thomson also indorsed this paper:

“Received and filed this 6th day of October, 1890.

Arch. Thomson,

Clerk.”

On the following day a memorandum was made by Mr. Thomson in the judgment book in his office, and in that book Mr. Thomson signed the entry, and then upon the paper above mentioned, on the margin, Mr. Thomson wrote:

D. C.  
1906

GEORGE  
v.

GREEN.

Britton, J.

“Entered in Liber C, folio 123,  
Oct. 7, 1890.”

And he signed: “A.T.  
L.R.”

I am of opinion that what was done in this case was a substantial compliance with Rules 764\* and 775† of the Consolidated Rules of 1888.

I find that there was no misrepresentation as to the service of the writ. It may be that Mr. Green's recollection as to service of writ is not accurate because of his supposing, if he did so suppose, that having made an assignment for the benefit of his creditors—having made a complete surrender—nothing more would be done in the action George had instituted. Mr. Green does not suggest this, nor did he say that there was any understanding or agreement with Mr. Delahaye as a consideration for making the assignment. It appears that shortly after the assignment Mr. George was willing to accept 25 cents on the dollar in full settlement; so I infer that at that time Mr. George was not very anxious to get a judgment, and that Mr. Green was not very anxious to prevent a judgment going.

Mr. Green, the plaintiff in the issue, urged, upon the trial, the further objection that the judgment by default could not stand, because the writ was not properly specially indorsed.

Was this writ specially indorsed so as to entitle the plaintiff to sign final judgment by default in case of non-appearance? The point presents considerable difficulty. I have looked at a great many cases—those collected by Mr. Middleton in his instructive article 13 C.L.T. 66—and others, and, not without some measure of doubt, I have reached the conclusion that the indorsement under consideration was not sufficient.

\* Con. Rule 764 of 1888. Every judgment whether pronounced by the Court or signed by default shall be drawn up and signed by a Registrar, Local Registrar, Deputy Registrar or Deputy Clerk of the Crown, as the case may require.

† Con. Rule 775 of 1888. The Entering Clerk is to note in the margin of the judgment or order book the day of entering a judgment or order, and is at the foot of the judgment or order to note the same date, and the book in which the entry has been made and the pages of such book.

For present Rules see *post* pp. 198, 199.

The writ was indorsed as follows:

“The plaintiff’s claim is for the price of goods sold and delivered by the plaintiff to the defendant, the account for which goods has been stated between the plaintiff and the defendant.”

The following are the particulars:

“1890, April 4. To balance due the plaintiff on an account for goods sold and delivered by him to the defendant, and which account has been rendered by the plaintiff to the defendant and admitted by him to be correct and stated between them, and which balance of account has also been rendered by the plaintiff to the defendant and admitted to be correct and stated at the sum of.....	\$2,389.46
July 29. To interest for 3 5-6 months at 6%.....	45.79
	<hr/>
	\$2,435.25

Cr.

April 19. By cash.....	\$50.00	
July 29. By interest for 3¼ months at 6%....	.83	50.83
		<hr/>
		\$2,384.42

And the sum of \$50, for costs, and if the amount claimed be paid to the plaintiff or his solicitors within eight days from the service hereof, further proceedings will be stayed.”

This writ was issued on July 30th, 1890, so proceedings are governed by Rule 245 of the Consolidated Rules of 1888. There were four classes of matters for which there could, then, be special indorsement, where the claim was for debt or liquidated demand, with, or without interest, arising upon a contract express or implied, as for instance:

- (1) upon bill or note or cheque or other simple contract debt;  
or
- (2) on a bond or contract under seal for payment of a liquidated amount of money; or
- (3) on a statute when the sum sought is a fixed sum or in the nature of a debt other than a penalty; or
- (4) on a guaranty whether under seal or not where the claim against the principal is in respect of such debt or liquidated demand only, etc.

D. C.

1906

GEORGE

v.

GREEN.

Britton, J.



D. C.  
1906  
GEORGE  
v  
GREEN.  
—  
Britton, J.

This claim is for a debt or liquidated demand, so far as the indorsement alleges an account admitted by the defendant, and stated between the parties at the sum of \$2,389.46. The claim for interest on this amount is not, under the authorities, shewn to be properly the subject of special indorsement. It is not alleged that upon the account as rendered there was any claim for interest, or that interest was in any way demanded, or that defendant would be charged with interest, or that he promised to pay interest. Nothing is set out or stated from which a promise to pay interest can be implied.

The case of *Rodway v. Lucas* (1855), 10 Ex. 667, is the one most in the plaintiff's favour.

In that case the indorsement objected to was for interest on an I.O.U., and it was held that the judgment was regular, and because upon an I.O.U. there was an implied contract to pay interest; but even in that case the Court thought it necessary to say: "In all cases except those of bills of exchange and promissory notes, if a plaintiff by such indorsement claims interest where it is not due by contract, express or implied, and on default of appearance signs judgment for it, the Court will set aside the judgment and make the attorney pay the costs."

*Huffman v. Doner* (1888), 12 P.R. 492, decided that "where a writ of summons is indorsed with the particulars of a liquidated demand and also for a claim for unliquidated damages, the plaintiff may without an order sign a combined final and interlocutory judgment." That is not what was done in the present case.

*Hay v. Johnston* (1888), 12 P.R. 596, decided that there might be the two judgments; and these cases were both followed in *MacKenzie v. Ross* (1891), 14 P.R. 299. *Hay v. Johnston* was, however, not followed in *Hollender v. Ffoulkes* (1894), 16 P.R. 175, *infra*.

In *Sheba Gold Mining Co. v. Trubshawe*, [1892] 1 Q.B. 674, the indorsement claimed a balance for goods sold, and claimed interest. It was held that it was not good as a special indorsement where plaintiff was seeking only to recover a liquidated demand.

In *Wilks v. Wood*, *ibid.*, at p. 684, it was held that where a plaintiff claims by his writ interest not arising under a statute or by contract express or implied, he is not within the order.

In *The Gold Ores Reduction Co., Ltd., v. Parr*, [1892] 2 Q.B. 14, it was held that the indorsement, in order to be a good special

indorsement, must shew either that the interest claimed is payable under an agreement or that it is fixed by statute.

In *Munro v. Pike* (1893), 15 P.R. 164, Armour, C.J., said, at p. 166: "The true rule as to what is a good special indorsement is to be found" in the two cases last cited.

In *Hollender v. Fjoulkes*, 16 P.R. 175, the indorsement was to recover the amount of a foreign judgment and interest from date, and it was held that the claim for interest was an unliquidated amount, and that the two claims did not constitute a good special indorsement within Rule 245: see *Solmes v. Stafford* (1893), 16 P.R. 78; in appeal (1894), *ibid.* 264.

It was held in the latter case that where there was the indorsement for interest on a foreign judgment, the indorsement could not be amended on the motion to support an order under Rule 739.

In *M'Vicar v. M'Laughlin* (1895), 16 P.R. 450, the indorsement was held good as to interest upon promissory notes; but, *semble*, "had the indorsement lacked the essentials of a special indorsement such a judgment by default would have been a nullity."

In *Clarkson v. Dwan* (1896), 17 P.R. 92, it was held that interest on notes simply claimed as interest may be indorsed for, and also that an indorsement "*for goods sold and delivered during the year 1894 to the defendant*" was a good special indorsement. In this case defendant appeared, and on motion plaintiff failed to verify his indorsement, and it was held that an amendment should not be allowed, and that judgment could not be given according to the special indorsement for one part, and for the defendant as to the other; the indorsement failed altogether.

In *Appleby v. Turner* (1900), 19 P.R. 145, it was held that a writ cannot be specially indorsed for taxed costs against sureties in an action upon an appeal bond, and a judgment for default of appearance is a nullity—not curable by default or acquiescence. The judgment for plaintiff "must at his peril be strictly regular."

Where a plaintiff has obtained judgment irregularly, upon a specially indorsed writ, the defendant is entitled *ex debito justitiæ* to have it set aside: see *Anlaby v. Prætorius* (1888), 20 Q.B.D. 764. "If judgment is not warranted by any enactment it is much more than an irregularity:" see *Smurthwaite v. Hannay*, [1894] A.C. 494, 501.

D.C.

1906

GEORGE

v.

GREEN.

Britton, J.

D. C.  
1906  
 GEORGE  
 v.  
 GREEN.  
 —  
 Britton, J.

Since the cases above cited Rule 603 has been amended by the addition thereto of sec. 3, permitting, upon motion for judgment, any amendment of the writ which might be ordered on a substantive motion.

That does not assist in the present case, where defendant has not appeared.

Where an appearance has been entered the defendant can always resist summary judgment if the writ was really not properly specially indorsed, or if there is reasonable ground for disputing the claim.

In this case there was nothing proved that would entitle George as of right to interest. There was no express or implied promise to pay interest.

The \$2,389.46 as indorsed on writ was made up as follows:—

"George & Green partnership account, Aug. 22, 1889.	\$2,672.07	
Certain items down to November 19, 1889 .....	23.10	
Interest to November 19, 1889 .....	61.00	
		<hr/>
		\$2,756.17
Less cash .....	\$246.25	
" account .....	7.20	253.45
		<hr/>
		\$2,502.72
April 4, 1890. 3 months' interest .....		37.54
		<hr/>
		\$2,540.26
Less cash .....	\$150.00	
" interest .....	.80	150.80
		<hr/>
		\$2,389.46"

The beginning of the account was the partnership debt of George & Green to George of \$2,672.07. It was not shewn that there was any promise to pay interest on that, nor did it appear that Green knew of the account being increased in amount by the large charges for interest. Merely upon the question of Green's want of knowledge of, or indifference to the amount of the claim, it may be noted that although Green got credit by indorsement on the writ for the \$150 paid on April 19th, 1890, and although this same credit was given on the account filed with the assignee, he,

by error, omitted the credit in his statement of claim, and George's claim was placed upon the notice to creditors at \$2,435.61.

Upon the whole case I am constrained to hold that the plaintiff in the issue is upon terms entitled to have the judgment set aside and vacated. Upon the trial the merits were gone into, and I found, although perhaps not necessary for disposing of points reserved, that the plaintiff in the issue was, when the writ of summons issued, indebted to the late Wm. George in the amount claimed apart from interest. The judgment should be set aside only upon such terms as will be a fair and just protection to the defendant in the issue.

It would be a great injustice to the defendant in the issue not to impose terms. The facts are altogether exceptional. In allowing the plaintiff in the issue costs to the extent I do, the imposition of terms is in my power—and even without that it is in my opinion in my power in this case to do so, and if wrong it must be for an appellate Court to so say. The terms are that an appearance shall be entered by the plaintiff in the issue within ten days, and that all necessary time shall be extended to the defendant in the issue for proceeding with that action. She shall have two weeks from the entry of appearance for the delivery of the statement of claim. The action shall be tried without either party, so far as the Court can prevent it, being prejudiced by the delay. The receiver order will stand, and the receiver will be continued, and the money will remain in his hands for the settlement of such claims as Mary George, administratrix, may establish in the action. The plaintiff in the issue is to get costs of the motion to set aside the judgment, to be taxed, and costs of the issue and trial of the issue, which I fix at \$100. The plaintiff in the issue set up that the writ was not personally served, and made contentions not established, so he is not entitled to all the costs of that issue. These costs are to be set off against such claim as the defendant in the issue may establish. The costs of the action and the trial of it are reserved, and may be disposed of by the trial Judge. If these terms are not accepted by the plaintiff in the issue, judgment will be entered for the defendant in the issue without costs.

The present appeal, which was by the plaintiff in the issue, was argued on October 31st, 1906, before MEREDITH, C.J. C.P., and MACMAHON, and ANGLIN, JJ.

D. C.

1906

GEORGE

v.

GREEN.

Britton, J.



D.C.  
1906  
GEORGE  
v.  
GREEN.

*C. Millar* and *C. McCrea*, for the appellant, contended that the default judgment was a nullity: *Anlaby v. Prætorius*, 20 Q.B.D. 764; *Hughes v. Justin*, [1894] 1 Q.B. 667; *Hoffman v. Crerar* (1899), 18 P.R. 473; that being a nullity, the Court should not have imposed any terms, other than as to the costs of attacking it; and that it would be a pernicious practice to allow a plaintiff to sign judgment for default for more than the defendant admitted by his default.

*C. A. Moss*, for the respondent, contended that interest should be allowed on an account stated: *Blaney v. Hendrick* (1771), 3 Wils. 205; *Graham v. Myers* (1887), 67 Mich. 277; *Haight v. McVeagh* (1873), 69 Ill. 624; *Luetgert v. Volker* (1894), 153 Ill. 385; *Perley on Interest*, p. 85; *Amer. and Eng. Encyc. of Law*, 2nd ed., vol. 16, p. 1017; that Con. Rule 245 of 1888 at the time judgment was signed, provided for interest; that it was properly claimed in a special indorsement on an account stated. He also referred to: *Appleby v. Turner*, 19 P.R. 175; *Smurthwaite v. Hannay*, [1894] A.C. 494; *Black on Judgments*, 2nd ed., vol. 1, pp. 248, 326, 476; *Amer. and Eng. Encyc. of Law*, 2nd ed., vol. 17, pp. 824, 830, 840-1.

December 7. The judgment of the Court was delivered by ANGLIN, J.:—Appeal from the judgment of Britton, J., after trial of an issue without a jury at Pembroke. The Master in Chambers directed this issue to determine whether or not the plaintiff is entitled to have a default judgment entered against him in an action of *George v. Green*, set aside and vacated. The plaintiff alleged (a) that he had not been served with the writ of summons in the said action; (b) that judgment was never actually signed against him; (c) that the judgment entered is a nullity because the writ of summons was not specially indorsed. The learned Judge found against the plaintiff upon the question of service, and it is conceded that against this finding the plaintiff cannot successfully appeal. On the second point we expressed upon the argument our concurrence in the view of the learned trial Judge that the signature upon the back of the judgment by the local registrar under the words, "judgment signed 6th October, 1890," was a good and sufficient signing of judgment\*. Upon the third branch

\*The present rules are :

Con. Rule 628 of 1897. Every judgment pronounced by the Court or

the learned Judge held with the plaintiff, but he imposed terms as a condition of vacating the judgment to which the plaintiff is unwilling to submit. Hence his appeal on this branch, in which he asserts his right to have the judgment vacated unconditionally.

The propriety of directing that a question as to the validity of a default judgment, impugned because of alleged defects in the indorsement of claim upon the writ, should be determined by the trial of an issue is open to grave doubt. But as there was no appeal taken from the Master's order and as the learned trial Judge has dealt with it, we should, I think, entertain the appeal taken from his judgment.

The questions for determination are: (1) Whether the claim made for interest vitiates the "special indorsement" on the writ in the original action; (2) whether, if that be so, the judgment entered for default of appearance to such writ is a nullity incapable of rectification by amendment, or merely an irregularity which may now be cured by directing that the judgment be amended by confining it to the portion of the claim which was a proper subject of special indorsement; (3) whether, if the judgment be a nullity, the learned trial Judge had power to impose terms as a condition of vacating it. That he would have such power if the judgment were merely irregular can scarcely be gainsaid.

The indorsement on the writ of summons in the action of *George v. Green* is in the following terms: [setting it out].

The authorities make it clear that a plaintiff can specially indorse a writ with a claim for interest only where such interest is payable by statute, or by contract, express or implied, and that in the latter case an allegation of such contract must form part of the indorsement.

The only statutory authority for the claim of interest made by the plaintiff *George* is that found in sec. 113 of the Judicature Act: "Interest shall be payable in all cases in which it is now payable by law, or in which it has been usual for a jury to allow it." There

entered by default shall be signed by or under the direction of the officer in whose office the action was commenced.

Con. Rule 637 of 1897. The Entering Clerk shall note in the margin of the judgment or order book the day of entering a judgment or order, and shall at the foot of the judgment or order note the same date, and the book in which the entry has been made and the pages of such book.

D. C.  
1906  
GEORGE  
v.  
GREEN.  
Anglin, J.

D. C.  
1906  
GEORGE  
v.  
GREEN.  
Anglin, J.

being no allegation that the balance claimed is payable at a fixed time by virtue of a written instrument, or of a demand for payment, the case is not within sec. 114. Although it may be clear that in actions upon stated accounts it has been usual for juries to allow interest, we are, I think, bound by decisions of Courts of concurrent jurisdiction to hold that interest upon stated accounts is not, by virtue of sec. 113 above quoted, payable by statute so as to make it a proper subject of special indorsement: *Solmes v. Stafford*, 16 P.R. 78, 83-5; *Hollender v. Ffoulkes*, *ib.* 175. Neither is this a case in which interest was before the Judicature Act payable by law.

There is no allegation in the indorsement of a contract for payment of interest, unless such contract be implied from the allegation of an account stated. No such implication arises upon the mere stating of an account, though it may arise if the act of stating the account is accompanied by an agreement for immediate payment: *Chalie v. Duke of York* (1786), 6 Esp. 45; or for payment at a fixed future date: *Mountford v. Willis* (1800), 2 B. & P. 337.

A subsequent demand for payment would bring the case within sec. 114; and see *Pinhorn v. Tuckington* (1813), 3 Camp. 468. But neither an agreement for immediate payment or for payment at a fixed future date, nor a subsequent demand is alleged in this indorsement. The case of *Blaney v. Hendrick*, 3 Wils. 205, is merely an instance of a refusal by the Court to set aside a verdict of a jury awarding interest as damages upon an account stated. This case is not an authority for the proposition that such interest is payable by law or upon a contract implied, and that a jury should be instructed that they must allow it.

Notwithstanding some American decisions that an account stated entitles the creditor to interest (see *McClelland's Executor v. West* (1871), 70 Penn. 183, 187; *Case v. Hotchkiss* (1867), 1 Abb. App. Dec. (N.Y.) 324, 326; *Patterson v. Choate* (1831), 7 Wendell 441, 446), I think the weight of English authority is against that proposition, and that, in the absence of an allegation that a fixed time for payment was agreed upon or that a demand for payment was subsequently made, or of an account indorsed shewing that the parties had themselves in adjusting their accounts allowed interest upon balances outstanding (*Nichol v. Thompson* (1807), 1 Camp. 52n.), it cannot be said that a creditor upon an account stated is entitled to claim interest either by law or upon implied



contract, though a jury might and probably would allow such interest as damages.

It follows, I think, that the claim for interest made by the plaintiff George was not a proper subject of special indorsement.

The judgment in *George v. Green* was signed on October 6th, 1890. At this time there was not the power of amendment of a special indorsement, upon motion for judgment after appearance, now conferred by Rule 603 (3). Prior to this amendment of Rule 603, it was held that a plaintiff seeking such summary judgment must come with "all his tackle in order": *Paxton v. Baird*, [1893] 1 Q.B. 139, and could not ask to have a defective indorsement made good by amendment: *Clarkson v. Dwan*, 17 P.R. 206, or be allowed to sign judgment for so much of his claim as was susceptible of special indorsement: *Solmes v. Stafford*, 16 P.R. 264, 269-70; *Wilks v. Wood*, [1892] 1 Q.B. 684, 686. If such amendment should not formerly have been made on a motion for judgment upon which the defendant was represented, *a fortiori* it would seem that it should not have been made to cure a judgment entered against a defendant in his absence for default of appearance. I cannot understand why, except for the special provision as to default judgments to which I allude below, a plaintiff's motion for judgment after appearance was properly refused because of a defect in his special indorsement which he then sought to cure by amendment, if a judgment, entered for default of appearance, upon an indorsement similarly defective, might be amended, when challenged by the defendant, as merely a curable irregularity. Osler, J.A., in *Clarkson v. Dwan*, 17 P.R. 208, said, at p. 215: "Had judgment for non-appearance been signed it *must* have been set aside." Again in *McVicar v. McLaughlin*, 16 P.R. 450, although the Court upheld the judgment, deeming the indorsement on the writ good as a special indorsement, Osler, J.A., delivering the judgment of the Court (Hagarty, C.J.O., Osler and Maclellan, JJ.A.), said, at p. 453: "Had the indorsement been faulty in form, lacking the essentials of a special indorsement, it might well be held, as in *Rogers v. Hunt*, 10 Ex. 474, to be a nullity and incapable of supporting a final judgment as on default of appearance. Such a judgment would be one not authorized by the Rules, and therefore something more than an irregularity: *Smurthwaite v. Hannay* [1894] A.C. 494, at p. 501, *per* Lord Herschell. But, the indorsement being

D. C.

1906

GEORGE

v.

GREEN.

Anglin, J.



D. C.  
1906  
GEORGE  
v.  
GREEN.  
Anglin, J.

regular, the defendants' non-appearance is equivalent to an admission that the claim was correct and that he was bound to pay the whole demand." The default judgment depending upon an implied admission, and such admission not being presumed except upon a special indorsement strictly regular, the moment it was shewn that the indorsement relied upon was not warranted by some rule of Court which authorized the special indorsement of writs of summons the whole foundation on which the judgment rested was gone and the judgment itself could not stand. An amendment of the indorsement cannot, without a fresh service of the writ, import an admission by the defendant of the plaintiff's claim. It clearly follows, I think, that a judgment signed for default of appearance to a writ, the indorsement upon which is not a special indorsement authorized by the rules of Court, would be a nullity and not merely irregular and susceptible of cure by amendment: *Hoffman v. Crerar*, 18 P.R. 473, 479; *Appleby v. Turner*, 19 P.R. 145, 149. I have not overlooked the language of Osler, J.A., in this latter case in dealing with a Chambers' motion for leave to appeal, reported in 19 P.R. at p. 178, where he makes an allusion to the discretion of the Court to decline to set aside proceedings where the applicant is chargeable with laches, but it will be noted that his language is confined to "objections of irregularity," and affords no ground for questioning the proposition that a judgment by default "entirely unwarranted by the practice is a nullity not curable by delay or acquiescence" as enunciated by the Divisional Court: S.C. 19 P.R., at p. 148.

I have so far dealt with the argument presented at bar in support of the proposition that the judgment here entered was merely an irregularity and not a nullity, which proceeded upon the assumption that a judgment for default of appearance was in the same position as a judgment upon motion under former Rule 739. But this ignores altogether the provisions of Rule 711 of the consolidation of 1888\*, which was in force when the judgment in *George v. Green*

\*Con. Rule 711 of 1888. When the writ is indorsed with a claim for detention of goods and pecuniary damages, or either of them, and is further specially indorsed for a liquidated demand under rule 245 and any defendant fails to appear to the writ, the plaintiff may enter final judgment for the debt or liquidated demand, interest and costs against the defendant or defendants failing to appear, and interlocutory judgment for the value of the goods and the damages, or the damages only, as the case may be, and proceed as mentioned in such of the preceding rules as may be applicable

was entered. While under Rule 739 the indorsement was required to conform to Rule 245, which permitted special indorsement "where the plaintiff seeks *only* to recover a debt or liquidated demand," Rule 711 dealt with the case where "the writ is indorsed with a claim for detention of goods and pecuniary damages or either of them, and is further specially indorsed with a liquidated demand under Rule 245," and permitted the plaintiff, in default of appearance to such a writ, to enter final judgment for the liquidated demand and interlocutory judgment for the value of the goods and the damages, or the damages only, as the case might be. This Rule was not carried into the consolidation of 1897 without change. This fact may account for its having been overlooked by counsel. But Rule 575† of the consolidation of 1897, if applicable, would be wide enough to cover the present case.

The effect of the provisions of former Rule 711 is discussed by Osler, J.A., delivering the judgment of the Court of Appeal in *Solmes v. Stafford*, 16 P.R. 264, at pp. 270-1, and its history is outlined in *Hollender v. Fjoulkes, ib.*, at p. 177; and see *Hoffman v. Doner*, 12 P.R. 492.

It follows that, notwithstanding the addition of a claim for interest in the nature of unliquidated damages, final judgment might have been rightly signed for the liquidated demand upon the account stated. As to the rest of the claim, the judgment should have been interlocutory only. Final judgment for the whole claim entered in these circumstances was not, in my opinion, a nullity, but was merely irregular and, in the circumstances of this case, terms were rightly imposed on setting it aside.

The plaintiff Green was allowed by the learned trial Judge a definite period within which to accept these terms. Of that indulgence he failed to take advantage. He could not therefore complain if his present appeal were now to be simply dismissed with costs. But it may be that if this course can be taken without

D. C.  
1906  
—  
GEORGE  
v.  
GREEN.  
—  
Anglin, J.

† Con. Rule 575 of 1897. Where the writ is specially indorsed for a debt or liquidated demand in money under Rule 138, and any defendant fails to appear, the plaintiff notwithstanding that the writ may be indorsed with any other claim, may, as against such defendant, sign final judgment for any sum not exceeding the amount for which the writ is so specially indorsed together with interest as claimed to the date of the judgment, and for his costs, without prejudice to his right to proceed with the action against any other defendants, and as to any other claims indorsed.

D. C.  
1906  
GEORGE  
v.  
GREEN.  
Anglin, J.

undue prejudice to the position of the defendant George, it would not be unfair still to permit the plaintiff to defend the original action upon the terms indicated by the learned trial Judge, and such additional terms, if any, as may seem necessary to fully protect the defendant.

If the plaintiff so desires, he may apply to the Court for such relief. Unless he gives notice of such an application within one week, however, an order will issue dismissing this appeal with costs.

A. H. F. L.

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## [DIVISIONAL COURT.]

RE TAYLOR V. REID.

D. C.  
1906*Division Courts—Acceptance of Goods—Cause of Action—Statute of Frauds—Jurisdiction—Prohibition.*Nov. 11.  
Dec. 5.

In an action for \$45 the price of a coat ordered by the defendant in Toronto to be made and sent by the plaintiff to him at Belleville by express:—

*Held*, that the plaintiff must prove as part of his case an acceptance of the coat at Belleville and that certain letters written by him at Belleville to the plaintiff at Toronto while evidence from which acceptance might be inferred were not the acceptance itself: and as the plaintiff failed to prove this, the whole cause of action did not arise at Toronto within the jurisdiction of the division court in which the plaint was brought.

Prohibition ordered.

THIS was an appeal from an order for prohibition made by Teetzel, J.

The motion for the order was argued in Chambers on the 25th of September, 1906.

*Grayson Smith*, for the motion.

*A. R. Clute*, contra.

November 11. TEETZEL, J.:—Motion for prohibition in the matter of a certain plaint in the first division court of the county of York.

Plaintiff, a merchant tailor in Toronto, sued defendant, who resides in Belleville, for \$45, the price of a frock coat verbally ordered by defendant in Toronto to be sent by express to him at Belleville.

The defendant filed a notice disputing the jurisdiction, also setting up the 17th section of the Statute of Frauds.

The Statute of Frauds being applicable, the sole question is whether the whole cause of the action arose in the first division court of the county of York. In order to satisfy the statute in this case, it is not sufficient to prove delivery to the express company, which was defendant's carrier, but the plaintiff must also prove an acceptance of the goods by the defendant, or at least some act by the defendant in relation to the goods which recognizes a pre-existing contract. See cases collected in Benjamin on



D. C.  
1906

RE  
TAYLOR  
v.

REID.

Teetzel, J.

Sales, 5th ed., pp. 200 to 212; also *Scott v. Melady* (1900), 27 A.R. 193.

Whatever was done by the defendant to constitute an acceptance within the statute was admittedly done in Belleville, and must be proved by the plaintiff as an essential element in support of his right to the judgment of the Court, and is, therefore, a part of his cause of action.

Such part not being within the limits of the first division court of the county of York, the order for prohibition must issue, with costs to be paid by the plaintiff. See *Re Doolittle v. Electrical Maintenance and Construction Co.* (1901), 3 O.L.R. 460, and cases in *Bicknell & Seager*, 2nd ed., pp. 131-132.

From this judgment the plaintiff appealed to a Divisional Court, and the appeal was argued on the 22nd of November, 1906, before FALCONBRIDGE, C.J.K.B., BRITTON, and RIDDELL, JJ.

*A. R. Clute*, for the appeal. In suits for goods sold and delivered (a) the contract must be made, (b) the goods delivered, and (c) the breach, *viz.*, non-payment, take place within the same division: *Bicknell and Seager's Division Courts Act*, 2nd ed., p. 132; *Northey Stone Co. v. Gidney*, [1894] 1 Q.B. 99. The coat was delivered to the defendant in Toronto as it was delivered to the express company there, which company was defendant's agent, because paid by him: *Empire Oil Co. v. Vallerand* (1895), 17 P.R. 27, at p. 32; Benjamin on Sales, 5th ed., at p. 738. The breach, *viz.*, non-payment, took place in Toronto, because the debtor is bound to seek out and pay his creditor where he resides: *William Blackley, Ltd., v. Elite Costume Co., Ltd.* (1905), 9 O.L.R. 382; *Northey Stone Co. v. Gidney*, [1894] 1 Q.B. at p. 100. The contract which is one part of the "cause of action" was admittedly made in Toronto. But defendant contends that it is unenforceable, because not in writing. There was an "acceptance" in Belleville within the meaning of the Statute of Frauds. A "cause of action" does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved by the plaintiff in order to support his right to the judgment of the Court: *Read v. Brown* (1888), 22 Q.B.D. 128, at p. 131. The acceptance here is not part of the "cause of action," but is merely

evidence, taken in lieu of a written memorandum, of one fact (*i.e.*, the contract) required to be proved as part of the "cause of action:" Benjamin on Sales, 5th ed., at pp. 199, 200 and 212.

*Grayson Smith*, contra. Defendant having pleaded the Statute of Frauds, and there being no payment or sufficient memorandum in writing, plaintiff must prove acceptance or be non-suit. Delivery to the carrier is not acceptance: *Scott v. Melady*, 27 A. R. 193, at p. 196. Acceptance is a fact which must be proved, and is therefore a part of the cause of action, as defined in *Read v. Brown*, 22 Q. B. D. at p. 131; *Borthwick v. Walton* (1855), 15 C.B. 501. *Re Doolittle v. Electrical Maintenance and Construction Co.*, 3 O.L.R. 460, is directly in point. Acceptance could only take place at Belleville, and the court in Toronto has no jurisdiction. The letters written by the defendant in Belleville and received in Toronto cannot in themselves constitute acceptance. At the most they amount to evidence from which acceptance may be inferred: Benjamin on Sales, 5th ed., pp. 200-203; *Kibble v. Gough* (1878), 38 L.T. 204. In any event, the letters cannot be held to have been written in Toronto: *Empire Oil Co. v. Vallerand*, 17 P. R. 27; *In re Hagel v. Dalrymple* (1879), 8 P.R. 183; *Offord v. Bresse* (1894), 16 P. R. 332, following *Cherry v. Thompson* (1872), L. R. 7 Q.B. 573.

*Clute*, in reply.

December 5, BRITTON, J.:—To satisfy the Statute of Frauds, and to give the plaintiff the right to recover in an action in the first division court of the county of York, he relies upon an acceptance of the goods sued for—or upon something done, which as against the defendant must be regarded as acceptance.

Whatever was done in fact was done at Belleville.

Apparently upon the argument of the motion for prohibition, no question arose as to letters, or as to any admission within the jurisdiction of the first division court here.

If this question came up for decision, I am not prepared to say upon the authorities that an admission made within the jurisdiction merely of the doing of some act without the jurisdiction, would have the same effect as if the act itself was done within.

D. C.

1906

RE  
TAYLOR  
v.  
REID.

D.C.

1906

RE  
TAYLOR

v.

REID.

Riddell, J.

I think the learned Judge in granting prohibition was right, and for the reasons given by him.

Appeal should be dismissed with costs.

RIDDELL, J.:—This is an appeal from an order made by my brother Teetzel granting a motion for prohibition in the matter of a certain plaint in the first division court of the county of York.

The facts are set out in his judgment.

Upon the appeal before us it was contended by Mr. Clute (1) that it was not necessary to prove acceptance as part of the cause of action, and (2) even if it were necessary to prove acceptance, letters written by the defendant from Belleville and received by the plaintiff at Toronto constitute an acceptance in Toronto.

As to the first point, the position taken was that the contract is the cause of action and the only cause of action, and acceptance is merely evidence of the existence of the contract. This position must needs be taken by the plaintiff if he desires to avoid the result of the decision of this Court in *Re Doolittle v. Electrical Maintenance and Construction Co.*, 3 O.L.R. 460. In that case it was pointed out that "cause of action" means "every fact that is material to be proved to entitle the plaintiff to succeed—every fact which the defendant would have a right to traverse," as distinguished from mere evidence necessary to prove such fact.

I think this contention cannot prevail. It seems now to be settled law that a contract to which the 17th section of the Statute of Frauds applies is not void *ipso facto* if the formalities of the Act have been complied with—the contract is still a contract, but is not enforceable against the will of the contracting party: *Bailey v. Sweeting* (1861), 9 C.B.N.S. 843, *per* Williams, J., at p. 859, and Willes, J., at p. 861; *Britain v. Rossiter* (1879), 11 Q.B.D. 123, *per* Brett, L.J., at p. 127, and Thesiger, L.J., at p. 132; *Maddison v. Alderson* (1883), 8 App. Cas. 467, *per* Lord Blackburn, at p. 488. Indeed, the modern doctrine supports the contention of counsel for the defendant in *Leaf v. Tuton* (1842), 10 M. & W. 393, where it was decided that it was bad pleading and made the defendant open to a successful special demurrer, to plead specially that the provisions of section 17 had not been complied with. At p. 396, Parke, B., says to counsel: "You say the effect of the

plea is to admit a good contract at the common law but to avoid it on the ground of the requisitions of the statute?" to which counsel answers "Yes."

No doubt some of the older cases made a distinction between the 4th section, which they held merely rendered the contract unenforceable, and the 17th section, which they held made the contract absolutely void.

Much of the old learning upon this has now become obsolete. The history and evolution of the doctrines may be traced by the curious in such decisions as *Laythoarp v. Bryant* (1836), 2 Bing. N.C. 735; *Carrington v. Roots* (1837), 2 M. & W. 248; *Johnson v. Dodson* (1837), 2 M. & W. 653; *Elliott v. Thomas* (1838), 3 M. & W. 170; *Buttemere v. Hayes* (1839), 5 M. & W. 456; *Eastwood v. Kenyon* (1840), 11 A. & E. 438; *Fricker v. Tomlinson* (1840), 1 M. & Gr. 772, *per* Maule, J., at p. 773; *Reade v. Lambe* (1851), 6 Ex. 130; *Leroux v. Brown* (1852), 12 C.B. 801.

But even when such was considered to be the effect of the 17th section, it was held, under the strict system of pleading then in vogue, that where a plaintiff declared upon a contract within the statute, he must prove the acceptance or whatever act it was which took the case out of the statute—and this without a special plea setting up the statute as a defence. Such a plea we have seen was struck out on a special demurrer.

And under our present system of pleading in the High Court, suppose that a contract is set up on its face within the statute, the defendant admitting the contract, but pleading simply the statute, can it be doubted that the plaintiff could not succeed without proving something to take the case out of the statute? As at present advised, I think the defendant should plead in such a case in the way supposed; and if he did not admit the contract upon his pleading, he should be obliged to pay the costs of proving it, if established at the trial.

The plaintiff then must in the present case prove not only the contract but also something in the way of acceptance, that the contract may be "allowed to be good."

As to the second point, what is relied upon as constituting acceptance was the receipt by the plaintiff in Toronto of certain letters written by the defendant in Belleville. These letters are

D. C.

1906

RE  
TAYLOR  
v.

REID.

Riddell, J.



D. C.  
1906  
RE  
TAYLOR  
v.  
REID.  
Riddell, J.

beyond question good evidence of an acceptance sufficient to take the case out of the statute, but they are only evidence from which acceptance may be inferred, and are not the acceptance itself. Whether mere words can ever constitute an acceptance, as seems to be denied in some of the American cases, we need not decide. These letters clearly cannot be considered an acceptance, and the acceptance they tend to establish took place in Belleville.

The case is, therefore, brought within the decision in the *Doolittle* case. The order appealed from is right, and the appeal should be dismissed with costs.

FALCONBRIDGE, C.J.:—I agree that this appeal should be dismissed with costs.

G. A. B.

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## [DIVISIONAL COURT.]

F. T. JAMES CO. v. DOMINION EXPRESS CO.

D. C.

1907

Jan. 15.

*Carriers—Express Company—Contract to Forward Perishable Goods—Delay in Transmission—Gross Negligence—Railway Company—Agent or Servant—Notice of Claim for Damage to Goods—‘At this Office.’*

The defendants undertook to forward a consignment of fish from Selkirk, Manitoba, to Toronto, Ontario, subject to certain conditions expressed in the contract :—

*Held*, that the defendants' engagement implied that a safe and rapid transit would be furnished for the whole distance, and that contract was broken when the perishable goods were transferred to a freight train at Winnipeg, by which delivery was delayed; and this was negligence for which the defendants were liable as common carriers.

A special condition that the defendants should not be liable for loss or damage, unless it should be proved to have occurred from the gross negligence of the defendants or their servants, did not avail the defendants, because the railway companies employed by the defendants for the transaction of their business were to be regarded as the defendants' servants, and the negligence was to be accounted gross negligence.

Another condition was that a claim for loss or damage should be presented to the defendants in writing “at this office:”—

*Held*, that presentation at the head office of the defendants satisfied this requirement.

Judgment of Clute, J., affirmed.

APPEAL by the defendants from the judgment of Clute, J., at the trial, at Toronto, in favour of the plaintiffs with costs upon their claim for damages for injury to goods by delay in transportation, and dismissing the defendants' counterclaim for express charges with costs.

The plaintiffs by their statement of claim alleged:—

3. That on or about the 10th October, 1903, the plaintiffs by their agents, the Imperial Fish Co., delivered to the defendants as carriers at Selkirk, Manitoba, 274 boxes of fish contained in two cars, numbered respectively C.P.R. 81512 and C.P.R. 80146, to be by the defendants safely carried to Toronto by express, and there promptly and within reasonable time delivered to the plaintiffs.

4. That the defendants received the boxes of fish in good condition, and undertook to transmit the same by express to the plaintiffs at Toronto, and were aware when they received the fish of their perishable nature and of the necessity for prompt and expeditious transmission and delivery thereof.

D. C.  
1907  
JAMES  
Co.  
v.  
DOMINION  
EXPRESS  
Co.

5. That the defendants did not transmit the boxes of fish from Selkirk to Toronto by express, but for a great part of the way negligently transmitted the fish, or authorized or allowed it to be transmitted, by freight, and neglected to re-ice the fish or otherwise properly care for them, and in consequence of the defendants' neglect the fish were delayed in transmission, and became stale and worthless to the plaintiffs.

6. That had the fish been forwarded by express, as the defendants undertook to forward them, they would have reached Toronto on the 13th October, but in consequence of the negligence of the defendants the fish were not delivered to the plaintiffs until the 16th October, 1903.

7. That upon delivery of the fish to the plaintiffs, the plaintiffs refused to accept the same, owing to their damaged condition, and so notified the defendants, whereupon the defendants, by their agent, examined the fish and admitted that they were spoiled, and requested the plaintiffs to take the same and dispose thereof to the best advantage possible.

8. That the plaintiffs, in compliance with such request, received the fish from the defendants and disposed thereof at the best price obtainable therefor, namely, \$914.70.

9. That the defendants, since the receipt of the fish, have demanded from the plaintiffs payment of \$862 for express charges for the carriage thereof, but the plaintiffs have refused to pay the same, and say that they are not liable therefor.

10. That by reason of the neglect of the defendants and their failure to carry the fish by express and to deliver the same to the plaintiffs with reasonable despatch, the plaintiffs have suffered damage to the extent of \$1,662, but, after crediting the amount realized for the fish, at the defendants' request, the plaintiffs claim \$1,041.31, made up as follows:—

To invoice price of fish .....	\$1,662.00
To express and duty on 124 boxes to Buffalo .....	198.61
To labour and salt on same .....	36.70
To express and duty on 20 boxes to New York .....	58.70
	<hr/>
	\$1,956.01
By amount realized on fish sold .....	914.70
	<hr/>
	\$1,041.31

The defendants by their statement of defence alleged:—

2. That they were not common carriers of fish.

4. That they did not agree to carry any fish for the plaintiffs and that any agreement to carry the fish in question, if made, was made with the Imperial Fish Company, and the plaintiffs have no cause of action, and their action fails for want of parties.

5. That if the defendants agreed to carry the fish, the contract of carriage was made subject to the terms and conditions set out in a certain shipping bill or bill of lading, wherein the defendants agreed with the Imperial Fish Company, the consignors, that the defendants should not be held liable for any loss or damage except as forwarders only, and the loss, if any, in question was not due to any breach of contract, neglect, or default of the defendants in their capacity of forwarders.

6. That the plaintiffs also agreed in the said contract that the defendants should not be liable for any default or negligence of any person, corporation, or association to whom the property should or might be delivered by the defendants, etc., as in the contract.

7. That the defendants did not themselves undertake or purport to carry the fish, but carried the same only upon the various railway lines lying between the point of shipment and the city of Toronto, part of the carriage being performed by the Canadian Pacific Railway Company, and part by the Grand Trunk Railway Company, and the delay or negligence, if any, was not due to the defendants, but was due to one or other of the companies aforesaid, and occurred while the goods were off the established routes or lines run by the defendants.

8. That it was further agreed by the said contract that the defendants should not be liable for any damage to the property in question caused by the detention of any train of cars, and, if there was any loss or damage, it was due to the detention of the cars while the same were upon the lines of one of the companies aforesaid.

9. That it was further agreed by said contract that the defendants should not be liable for any loss or damage to the property in question unless it should be proved to have occurred from the fraud or gross negligence of the defendants or their servants, and the loss or damage, if any, was not due to such cause.

C. D.

1907

JAMES  
Co.

v.  
DOMINIO  
EXPRES  
Co.



D. C.  
1907  
JAMES  
Co.  
v.  
DOMINION  
EXPRESS  
Co.

10. That it was further agreed by said contract that the defendants should not be liable for the fish unless the same were properly packed and secured for transportation, and the same were not so packed and secured, nor were they iced, nor was any means taken properly to preserve them during the journey, and the loss or damage, if any, was due to the failure of the plaintiffs or their agents to comply with this term of the contract.

11. That it was further agreed by the said contract that the defendants should in no event be liable for any loss or damage, unless the claim therefor should be presented to them in writing at their office at Selkirk, Manitoba, within 90 days from the date of the contract, in a statement to which the said contract should be annexed, and the plaintiffs failed to file any claim or to make any claim in writing in accordance with the terms of such contract.

12. That if the defendants received the fish at all, the same were carried by them with due diligence and care and in exact fulfilment of their duties, if any, to the plaintiffs, and the defendants denied that they were in any way negligent or that the fish suffered any damage whatever through or owing to the detention of cars or delays while in the custody of the defendants.

13. That if the fish were not in good condition when they arrived, any loss arising therefrom was due to the fact that they were not in proper condition when they were delivered to the defendants for carriage.

The defendants also counterclaimed \$862 for the carriage of the goods from Selkirk to Toronto.

In reply the plaintiffs alleged:—

1. That if, by reason of the terms of the agreement referred to in the 5th paragraph of the defence, the defendants would not be liable for the damage claimed by the plaintiffs, nevertheless the defendants had waived their rights under that agreement by the subsequent agreement referred to in the 7th paragraph of the statement of claim, and were estopped from setting up the first agreement.

2. That if the fish were carried off the established routes or lines run by the defendants, they were so carried by reason of the negligence of the defendants.

3. That if the damage complained of by the plaintiffs occurred while the fish were upon the lines of one of the railway companies mentioned in the 8th paragraph of the defence, such railway company was the agent of the defendants, and the defendants were responsible therefor.

4. That full particulars in writing of the plaintiffs' claim were furnished and delivered to the defendants within 90 days from the date of the agreement.

5. That because of the failure of the defendants to carry out their contract with the plaintiffs and to discharge their duty as carriers of the fish, the plaintiffs were not liable to the defendants in any sum whatever for the carriage thereof.

The contract referred to in the statement of defence was in part as follows:—

“Negotiable.

“The Dominion Express Company, Limited.

“Received from Imperial Fish Company of Selkirk the under-mentioned articles, which we undertake to forward to the nearest point to destination reached by this company, subject expressly to the following conditions, namely:—

“This company is not to be held liable for any loss or damage except as forwarders only, nor for any loss or damage by fire, by the dangers of navigation, by the act of God . . .

“Nor shall the company be liable for any default or negligence of any person, corporation, or association to whom the below described property shall or may be delivered by this company, for the performance of any act or duty in respect thereto at any place or point off the established routes or lines run by this company, and any such person, corporation, or association is not to be regarded, deemed, or taken to be the agent of this company for any such purpose, but, on the contrary, such person, corporation, or association shall be deemed and taken to be the agent of the person, corporation, or association from whom this company received the property below described.

“It being understood that this company relies upon the various railroad and steamboat lines of the country for its means of forwarding property delivered to it to be forwarded, it is agreed that it shall not be liable for any damage to said property caused by the

D. C.

1907

JAMES

Co.

v.

DOMINION

EXPRESS

Co.

D. C.

1907

JAMES

Co.

v.

DOMINION

EXPRESS

Co.

detention of any train of cars or of any steamboat upon which said property shall be placed for transportation, nor by the neglect or refusal of any railroad company or steamboat to receive and forward the said property.

"It is further agreed that this company is not to be held liable or responsible for any loss of or damage to said property, or any part thereof, from any cause whatsoever, unless in every case the said loss or damage be proved to have occurred from the fraud or gross negligence of said company or its servants; nor in any event shall this company be held liable or responsible nor shall any demand be made upon them beyond the sum of \$50, at which sum said property is hereby valued, unless the just and true value thereof is stated herein; nor upon any property or thing unless properly packed and secured for transportation. . . .

"In no event shall this company be liable for any loss or damage unless the claim thereof shall be presented to it in writing at this office within 90 days from this date, in a statement to which this receipt shall be annexed.

"And it is also understood that the stipulation contained herein shall extend to and enure to the benefit of each and every company or person to whom, through this company, the below described property may be intrusted or delivered for transportation.

"The Dominion Express Company, Limited, assumes no liability for delays, losses, or non-delivery beyond their lines.

"Deliveries at all points reached by this company are only to be made within the delivery limits established by this company at such points at the time of shipment, and prepayment in such cases shall only cover places within delivery limits.

"The party accepting this receipt hereby agrees to the conditions herein contained.

"Date—October 10th, 1903.

"Articles—134 boxes fresh fish 19,600.

"Value—\$800.

"Consignee—F. T. James Coy.

"Destination—Toronto.

"Received by—George Robinson.

"C.P.R. Refrigerator No. 81512, *via* Smith's Falls.

"Date—October 10th, 1903.

"Articles—140 boxes fresh fish 21,000.

"Value—\$805.

"Consignee—F. T. James Coy.

"Destination—Toronto.

"Receipted by—George Robinson.

"C.P.R. Refrigerator No. 80146, *viâ* Smith's Falls."

D. C.

1907

JAMES  
Co.

*v.*  
DOMINION  
EXPRESS  
Co.

At the trial the plaintiffs confined their claim to one of the car-loads of fish.

The appeal was heard by a Divisional Court composed of BOYD, C., MACLAREN, J.A., and MABEE, J., on the 9th January, 1907.

*Wallace Nesbitt*, K.C., and *Shirley Denison*, for the defendants, appellants. What is the relation of an express company to a customer? We say the company are merely the agents of the customer to forward his goods, not forwarders, but in a position similar to tourists' agents. See *Kennedy v. American Express Co.* (1895), 22 A.R. 278, 284; 12 Am. & Eng. Encyc. of Law, 2nd ed., p. 548, note (6). No doubt, there is a higher duty in the case of perishable goods; the undertaking is to get the goods to their destination as expeditiously as possible, but not by any particular time, unless it is so specified in the contract. See *Taylor v. Great Northern R.W. Co.* (1866), L.R. 1 C.P. 385; *Northern Pacific Express Co. v. Martin* (1896), 26 S.C.R. 135; *Moore v. Harris* (1876), 1 App. Cas. 318. "This office" in the contract means the Selkirk office, where the contract was made. Upon the proper construction of the contract, the defendants are absolved from liability for the delay. See *Duckworth v. Lancashire and Yorkshire R.W. Co.* (1901), 84 L.T.N.S. 774; Hutchinson on Carriers, sec. 769; *Northern Transportation Co. v. McClary* (1872), 66 Ill. 233, 237; *Caledonian R.W. Co. v. Muirhead's Trawlers Limited* (1904), 41 Sc.L.R. 418. The defendants should be allowed the express charges counter-claimed for.

*G. F. Shepley*, K.C., and *G. H. D. Lee*, for the plaintiffs, referred to *Smith v. Whiting* (1834), 3 O.S. 597, and *Johnson v. Dominion Express Co.* (1896), 28 O.R. 203, to shew that the defendants are common carriers; and to *Fitzgerald v. Grand Trunk R.W. Co.*



D. C.

1907

JAMES

Co

v.

DOMINION

EXPRESS

Co

Boyd, C.

(1880-1), 4 A.R. 601, 5 S.C.R. 204, as to the want of precision in the contract; and contended that the defendants were liable for the delay.

*Nesbitt*, in reply, cited *Anderson v. North British R.W. Co.* (1875), 2 Rett. 443; *McConnachie v. Great North of Scotland R.W. Co.* (1875), 3 Rett. 79.

January 15. The judgment of the Court was delivered by BOYD, C.:—The engagement of the express company, which is an undertaking to forward to the nearest point to destination, implies that a safe and rapid transit will be furnished by the company for the whole distance, and that contract was broken when the perishable goods were transferred to a freight train at Winnipeg, by which delivery was delayed beyond the proper time, according to the usual method of transmission by fast train. Negligence is attributable to this deviation from the usual and proper method of forwarding the goods. The defendants are common carriers, and are liable as such for acts of negligence: *Martin v. Great Indian Peninsular R.W. Co.* (1867), L.R. 3 Ex. 9.

The special clause in the receipt, that the company shall “not be liable for loss or damage for any cause whatever, unless it be proved to have occurred from the . . . gross negligence of the company or its servants,” does not help the situation. According to well settled rules of liberal construction in these carriers’ cases, the agencies they employ for the transaction of their business (whether independent lines of railway or not) are all accounted employees, agents, or servants of the contracting company. Every person who, directly or indirectly, is employed by a company as a carrier to do that which the company have engaged to do by themselves or others under them, is a *servant*. That principle of construction was laid down as early as 1848 in *Machu v. London and South Western R.W. Co.* (1848), 2 Ex. 415, upon a statute which is *in pari materiâ* with the language of this contract; and that canon has been recognized as of authority in the subsequent cases: see *Stephens v. London and South Western R.W. Co.* (1886), 18 Q.B.D. 121, 124. It is adopted as expressive of the law in the latest compilation of law in the United States: see 6 Cyc. p. 369.

What occurred in this case in the handling of the fish cars was “gross negligence,” as defined by the Courts—meaning that want

of reasonable care, skill, and expedition which may properly be expected: see *Beal v. South Devon R.W. Co.* (1864), 3 H. & C. 337.

The alleged want of notice at the local office should not prevail: the language is not clear as to what is meant by "at this office." It is amply satisfied, so far as the practical and substantial information as to the loss is called for, by communicating with the head office of the company. The right of recovery should not be defeated on this narrow ground, having regard to the ambiguity of the terms: *Miles v. Haslehurst* (1906), 23 Times L.R. 142.

The right on the counterclaim to recover for the express charges on the other car of damaged fish may well be left for discussion when the question is agitated as to the right to recover for that damage. I agree that the counterclaim as to this should be dismissed without costs and without prejudice to its recovery against the proper party.

The judgment should be affirmed with costs.

E. B. B.

D. C.

1907

JAMES  
Co.  
v.

DOMINION  
EXPRESS  
Co.

Boyd, C.

## [DIVISIONAL COURT.]

1905

McFARLANE V. GREENOCK SCHOOL TRUSTEES.

Sept. 14.

*Public Schools—Change of School Site—Meeting to Determine—Poll—Right of Farmers' Sons to Vote.*

1907

Jan. 23.

By the Public Schools' Act, 1 Edw. VII., c. 39, sec. 34 (O.), it is enacted that the trustees of every rural school section shall have power to select a site for a new school house, or to agree upon a change of site for an existing school house, and shall forthwith call a special meeting of the ratepayers of the section to consider the site selected by them; and no site shall be adopted, or change of site made, except in the manner hereinafter provided, without the consent of the majority of such special meeting:—

*Held*, that there is power to hold a poll at such a meeting, and that at such polling persons entered on the assessment roll as "farmers' sons" are entitled to vote.

THIS was an application for an injunction to restrain the trustees of the Greenock public school section from proceeding with the substitution of a new school site for the present school site under the circumstances mentioned in the judgment.

The motion was argued on September 7th, 1905, before MAGEE, J., in Weekly Court.

*G. H. Kilmer*, for the plaintiff.

*A. W. Ballantyne*, for the defendant.\*

September 14, 1905. MAGEE, J.:—The injunction is asked upon the ground that the special meeting of ratepayers called by the trustees to consider the new school site selected by them decided against its adoption, and that the meeting having so decided, there was no power to hold a poll, and that at the polling the adoption was carried by reason of persons entered on the assessment roll only as "farmers' sons" being allowed to vote in its favour.

The present Public School Act is ch. 39 of the Statutes of 1901 (1 Edw. VII., ch. 39 (O.)), which has not been amended in any respect affecting this question.

The difficulty arises over the use of the word "ratepayer" in the 34th section as to changing site, and its definition in sec. 2, which does not include "farmers' son," and the fact that by sec. 13 not only every ratepayer but "every person qualified to vote

\* The argument turned entirely on the construction of the statute.

as a farmer's son under the Municipal Act" is entitled to vote at any election for school trustee or on any school question whatever. The plaintiff urges that only ratepayers as defined in sec. 2 are entitled to be heard under sec. 34. The defendants say that under sec. 13 and sub-sec. 4 of sec. 15 the votes of farmers' sons were properly received.

The present Act is in these respects the same as the Public Schools Act of 1896 (59 Vict. ch. 70 (O.)), which consolidated the public school Acts to that date. In the previous consolidating Act of 1891 (54 Vict. ch. 55 (O.)) no such difficulty arose. "Ratepayer" was there defined as at present, but there was no provision as to farmers' sons: see secs. 2, 15, 16, 22, 64, 66. The Act of 1896 introduced the provision enabling "farmers' sons" to vote, and altered the form of declaration required to be made by a voter at the poll so that it could be made by that class, and also qualified them, if resident, to be trustees: see secs. 2, 9, 14, 31. It would thus seem as if their qualification to vote or to be a trustee was an innovation in 1896. But going back to the Public Schools Act in the Revised Statutes of 1887, ch. 225, in sec. 2 the word "ratepayer" was at that time defined as including "any person entered on the assessment roll as a farmer's son," and in sec. 21 the voter could declare himself qualified as a farmer's son. The Act of 1896 was therefore merely a return to the policy of allowing that class to vote which had been omitted or discarded in 1891.

The words used in sec. 13 of the present Act are very broad, and give the right to vote "at any election for school trustee or on any school question whatsoever." But for the plaintiff it is urged that sec. 34 of the present Act deals with a specific matter, and the specific course therein pointed out should be followed, and that the word "ratepayers" used should only have the meaning expressly given to it by sec. 2, and especially as it deals with a question of important outlay the burden of which will fall on that class. Without considering whether the franchise was not conferred on them, because they do in fact bear the incidence of taxation, though not property owners, a reference to other sections of the Act may enable us to get at the intention of the Legislature.

Although the right of voting is conferred on "farmers' sons," they are not mentioned in this Act anywhere but in secs. 13 and 15. Elsewhere the reference is only to "ratepayers," and although

D. C.  
1905

McFARLANE  
v.  
GREENOCK  
SCHOOL  
TRUSTEES.

Magee, J.



D. C.  
1905  
McFARLANE  
v.  
GREENOCK  
SCHOOL  
TRUSTEES.  
Magee, J.

farmers' sons are expressly given the right to vote at elections of trustees, yet sec. 14 only directs a meeting of ratepayers for such an election, and sec. 15 directs the secretary to enter in the pollbook the names of the "ratepayers" offering to vote. To hold that because only the word "ratepayers" is used the intention expressed in sec. 13 shall not be given effect to, would manifestly carry us too far and render that section wholly nugatory. If, then, in sec. 15, sub-sec. 2, the word "ratepayers" does not exclude farmers' sons, it will require some other argument to make it so restrictive in sec. 34.

Section 2 only defines the meaning of the word "ratepayer" "unless a contrary intention appears." In my view a contrary intention does appear where the word is used in relation to those who have the right to vote, and there it must be taken to include all, or rather not to exclude any having such right. It may not be necessary to give the same interpretation to it where it is not a matter of voting but only a matter of requirement or demand, as, for instance, petitioning for union of school sections, calling a meeting of ratepayers, or requiring the calling of a meeting of trustees, or perhaps demanding a poll.

A narrower construction of sec. 34 is perhaps also open, which does not any more accord with the plaintiff's view. The trustees are to call a special meeting of the ratepayers. If at such meetings school questions are to be voted on, and farmers' sons have the right to vote on all such questions, they must be at liberty to attend the meeting. It is not necessary for the trustees to call a meeting of ratepayers and farmers' sons. The meeting of ratepayers being called, under the Act the farmers' sons have the right to be present and are bound by the notice. Then, the meeting being so called, no change of school site shall be made without the consent of "the meeting," that is, of those authorized to attend it.

In the rural school sections it is apparently the intention of the Legislature that questions shall be disposed of as quickly and with as little inconvenience to those who are interested as possible. Section 15 allows a poll to be demanded by any two ratepayers at any meeting for the election of trustees or the settlement of any school question, and the poll is to be forthwith granted by the chairman and apparently proceeded with at once, and the chairman and secretary are to count up the votes and announce the result.

If the question submitted be adopted, the chairman so declares it, and in case of a tie he gives the casting vote. The voting is apparently part of the meeting, as much so as voting at a meeting of shareholders of a company, and intended to go on at once when the poll is granted. The annual meetings commence at 10 a.m. (sec. 14,) and the poll closes at 4 p.m. (sec. 15,) and a copy of the minutes and of the poll book must be sent to the inspector.

If farmers' sons are to be given the right to vote on all school questions, they must have the right to attend the meetings, whether there is a poll or not, for voting need not be by a poll unless demanded (sec. 15 (1),) and it is the consent of the majority of the meeting which is required.

But then it is said that the provisions of sec. 15 as to a poll do not apply to a question of change of school site under sec. 34, but only to the annual meetings referred to in sec. 14. It is urged in behalf of this contention that under sec. 15 there must be a chairman to grant a poll and announce the result and a secretary to prepare the poll book and enter the votes, and that it is only in sec. 14 that a chairman and secretary are spoken of. But sec. 15 expressly refers to any meeting, and sub-sec. 3 of sec. 14 authorizes a chairman and secretary "at any school meeting." In the Act of 1891 that sub-section was a separate section (sec. 19), and the mere rearrangement does not afford sufficient reason to restrict the meaning of the words employed.

It is also argued that as sec. 34 requires the appointment of arbitrators "then and there," it cannot be intended that there should be a poll. But the fact that the polling is part of the meeting is a sufficient answer to that objection, though indeed it implies that the voters shall remain till the close of the poll so as to take part if necessary in choosing an arbitrator.

Another objection to the poll was that it was granted on the demand of two persons, one of whom, Wm. Alexander, was a farmer's son, and not a ratepayer. It is said on the other side that he is a ratepayer. The only documentary evidence offered is not conclusive. Whether he comes within the definition of ratepayer in sec. 2 makes, I think, no difference. It appears from the affidavit of Robert Russell filed on behalf of the plaintiff that the poll was granted by the chairman on a shew of hands, so that apparently the chairman did not act only upon the demand made by the

D. C.

1905

McFARLANE

v.

GREENOCK  
SCHOOL  
TRUSTEES.

Magee, J.

D. C.  
1905  
—  
McFARLANE  
v  
GREENOCK  
SCHOOL  
TRUSTEES.  
—  
Magee, J.

two persons, but also upon the expressed desire of the majority of the meeting. No objection upon this score was made at the time, nor any objection made to the inspector within twenty days, as prescribed by sec. 15.

As I consider the poll was proper and a part of the special meeting, and that farmers' sons were entitled to vote, the plaintiff's objections to the result of the vote fail, and I am unable to grant the injunction on the grounds on which it is asked against the change of site or removal or completion of the school.

At the argument the plaintiff presented a further affidavit by one of the trustees that he had not been notified of any meeting at which any expenditure for the removal of the school or for the improvement of the new site had been authorized, and an injunction against expenditure was asked on this ground. Defendants met this with affidavits of both the other trustees that he had been notified, and giving particulars such as to strengthen the statement. Although this ground was not stated in the notice of motion, yet, as it has been dealt with to some extent on both sides, I will, if plaintiff desires, give leave to amend the notice of motion in that respect, and adjourn the motion till a date desired by the plaintiff not later than September 21st, to enable him to cross-examine on that point, the defendants being enjoined or undertaking in the meantime against expenditure of school moneys for the purposes referred to. Otherwise I refuse the motion with costs in the cause to the defendant, unless the trial Judge otherwise directs. I may say that I have dealt with the matter as I have as it was practically a question of construction of the statute on which the evidence at the trial could throw no additional light. If the parties desire it may be turned into a motion for judgment.

The parties consenting that the motion for injunction herein be turned into motion for judgment, the action is dismissed with costs (including the costs of the motion for injunction), for the reasons given for the refusal of the injunction asked for.

On January 23rd, 1907, the plaintiff appealed to the Divisional Court (FALCONBRIDGE, C.J.K.B., BRITTON, and RIDDELL, JJ.), but the Court dismissed the appeal without calling on counsel for the defendants.

## [DIVISIONAL COURT.]

BURKE V. THE CORPORATION OF THE TOWNSHIP OF TILBURY NORTH.

D. C.

1906

*Municipal Drainage Act, R.S.O. 1897, ch. 226, sec. 93 and Amendment—  
Trespass—Compensation—Proceedings by Action instead of by Notice.*

May 15.  
Oct. 23.

In an action brought against a township corporation and its contractor for damages caused by the variation of the specifications by the contractor for constructing a drain under the Municipal Drainage Act, R.S.O. 1897, ch. 226, in placing earth excavated in digging the drain upon the land of the plaintiff without permission:—

*Held*, that whether the plaintiff was entitled to be compensated or not her claim fell under sec. 93 of the above Act as amended, and her remedy was by notice and proceedings before the drainage referee as provided for by the said section, and not by writ and proceedings in an action.

THIS was an appeal from a judgment at the trial in an action for trespass, in placing earth on plaintiff's land by a contractor in variation of the specifications for the construction of a drain by the defendants, which was tried at Hamilton on the 15th of May, 1906, before CLUTE, J., without a jury.

*H. H. Bicknell*, for the plaintiff.

*A. H. Clarke, K.C.*, and *F. E. Nelles*, for the defendants.

At the close of the evidence the following judgment was delivered in which the facts are stated.

May 15, 1906. CLUTE, J.:—The plaintiff brings this action of trespass as the owner of lot 18 in the first concession of the township of Tilbury North, charging the defendants with having trespassed upon the lot and deposited earth and soil upon the same, while the defendants were digging a drain.

The defendant corporation passed a by-law to have a certain drain dug in accordance with the plans and specifications prepared by the engineer. The contract was let to the defendant Roszell, the corporation reserving the right of supervision over the contract by their engineer and also by their commissioner.

At the time the contract was let the proposed contractor stated, in the presence of the reeve, that he would not contract at the price unless he was permitted to put the dirt, where cuts were necessary through the high lands, upon the adjoining lots. This the reeve



D. C.  
1906  
BURKE  
v.  
TOWNSHIP  
OF  
TILBURY  
NORTH.  
Clute, J.

declined to accede to; that is, he declined to give express authority, and thereupon it was stated that nearly all the owners had consented, and the reeve intimated, if that was the case, there could be no objection to putting the earth upon these lands. And it is said on that occasion that Mr. Holland, who was said to be the agent of the plaintiff, was present, and said that he would undertake there should be no trouble in regard to that lot if the earth were put upon the lands.

That is expressly denied. At all events the contract was made. A ditch was dug, the drain made, and over these lands was put a portion of the earth taken from the ditch, covering in the neighbourhood of from ten to twenty feet, varying in distance, from the line, and amounting in area to about one half acre, more or less.

The defence which the defendants set up is: First, that this case and the relief sought is one which falls within sec. 93 of the Municipal Drainage Act as amended by the Ontario statute passed in 1901, ch. 30, sec. 4 (O.). It is, as I understand the argument of Mr. Clarke, conceded, that prior to this statute the present case would not necessarily have fallen under the jurisdiction of the Referee, but that the purview and intention of this statute is sufficiently broad to bring the case within it, and that only the drainage referee would have jurisdiction to try this case.

Upon a careful reading of the section, I do not think that is so. The section provides in part as follows: "That all applications to set aside, declare void, or otherwise . . . attack the validity of any petition, report, . . . shall be made to the referee only," and then the section proceeds, "as well as all proceedings to determine claims and disputes arising between municipalities or between a company and a municipality, or between individuals and a municipality, company or individual, in the construction, improvement or maintenance of any drainage work under the provisions of this Act, or consequent thereon, or by reason of negligence, or for a mandamus or an injunction, shall hereafter be made to and shall be heard or tried by the referee only," etc. I am of opinion that this statute was intended to and does cover all actions which arise by reason of the legal and proper prosecution of the work, and that it is not sufficiently broad to include a case of this kind. In other words, that the present case does not fall within the statute, because it is not a dispute or claim which naturally

and properly arises by reason of the drain being put there or consequent thereon, or by reason of any negligence in its construction.

It is an entirely distinct trespass, and trespass upon other lands, just as much so, I think, as if the earth had been taken at any distance and deposited upon any stranger's land, and I do not think this Act was ever intended to deprive the Courts of their proper jurisdiction in a case of trespass of that kind.

Then it is further said, that in the present case there is no liability so far as the township is concerned, because the agent of the plaintiff gave authority to do this very thing.

In my view, the agent, who was there to look after the farm in a certain sense, had no authority whatever to authorize any trespass of this kind. And I think that was evidenced by what he said, intimating (assuming that the evidence of the defendants' witnesses is correct) that he would either obtain permission or see that there was no objection in that regard; it was an indication to all present that he had not at that time authority to give that permission. And this is somewhat important, because the reeve and the clerk being present, the contract was made apparently at that time, and they therefore knew of the intention of the contractor to put this earth upon the adjoining lands, they must have just taken the risk that he had obtained or would obtain leave to do so, or there would be danger of objection being taken to a trespass of that kind. I think no defence can be rested upon the alleged agency.

Then comes the further question as to whether or not this was really a proper case to be brought—whether a case could be made against the municipality—because there was an independent contract, it is alleged, and if any one was liable, only the contractor who assumed to do the work would be liable. I do not think that position can be sustained. Reference may be made to *Pickard v. Smith* (1861), 10 C.B.N.S. 470, and that class of cases. In other words, in the present case the township reserved to itself the right of supervision and exercised that right; and there was not, therefore, an independent contract such as would relieve the municipality from any trespass that might be done under it.

The only question remaining is one of damages.

I think the defendants are liable, but I do not think the case is a proper case for an injunction. I think the damage to the land

D. C.

1906

BURKE

v.

TOWNSHIP

OF

TILBURY  
NORTH.

Clute, J.

D. C.  
1906  
BURKE  
v.  
TOWNSHIP  
OF  
TILBURY  
NORTH.  
Clute, J.

is very small indeed. The only way which the learned counsel for the plaintiff was able to put it, and very ingeniously put it indeed, was, it would cost so much to have this earth removed. But there was no evidence that this land was of any special value in the sense that it would justify the expense of \$200 or \$300 to remove some six hundred yards of earth. The land is variously estimated in value to be worth from \$6 to \$20 an acre. Assuming it to be worth \$10 an acre, there was less than or about half an acre injured, so the value of the land itself, the whole value of the land, would be only about \$5. It was said it would take a man about one day to level this down—I am not forgetting the evidence of a number of witnesses who do not think there was any substantial damage—however, a man has a right to have his land free from trespass.

Trespass has been, I think, committed. There is some trifling appreciable damage, which I assess at \$10. I think that is the full damage that has been proven here. In fact, a liberal allowance.

The difficulty that I really feel in the case has been the question of costs, and had it not been that the plaintiff's title is expressly denied to this land, I should have felt great hesitation in making any order as to costs at all. But the fact that the title to the land was denied, and the fact that the plaintiff has a right of action, and on the pleadings as stated, no other Court would have, as I understand, the necessary jurisdiction to try the case, I think the plaintiff is entitled to his costs.

Judgment for plaintiff for \$10 and full costs of action.

I think I ought to add, perhaps, that I do not consider the defendants entirely free from fault; I mean aside from the technical trespass. Knowing that the owner of this land was absent, I think they should have communicated with her and got her express permission before taking the course they did take, and this also influences me in regard to the question of costs.

From this judgment the defendants appealed to a Divisional Court, and the appeal was argued on the 22nd of October, 1906, before FALCONBRIDGE, C.J.K.B., BRITTON, and MABEE, JJ.

A. H. Clarke, K.C., for the appeal. The township is not liable in any event, as the contract was let to a contractor who committed the trespass, if any; but even if the township was responsible, the

plaintiff is in the wrong forum. By the Drainage Trials Act, 54 Vict. ch. 51 (O.), a referee was appointed who had the powers of arbitrators under the Municipal Act, sec. 2, sub-sec. (5), but if an action was brought for damages in a case in which the proper proceeding was under that Act, the Judge then had power to refer it to a referee: sec. 19. See also 57 Vict. ch. 56, secs. 93 & 94 (O.). Then secs. 93 & 94 were repealed in 1901 by 1 Edw. VII. ch. 30, secs. 4 & 5 (O.); and the plaintiff's proceedings should have been taken before the referee only. I refer to *Hiles v. The Corporation of the Township of Ellice*, in 1 Clarke & Scully's Drainage Cases (1894), p. 89; *Thackery v. Township of Raleigh* (1898), *ib.* 328, at pp. 330 and 331; *McCulloch v. Township of Caledonia* (1898), 2, Clarke & Scully's Drainage Cases, 1 at p. 6; and on the question of separate contractor or not: *Penny v. The Wimbledon Urban District Council*, [1898] 2 Q.B. 212; [1899] 2 Q.B. 72; *Ellis v. The Sheffield Gas Consumers Co.* (1853), 2 El. & B. 767. There was no dispute as to the title of the land damaged.

*C. A. Moss*, for the contractor. All proceedings "for the recovery of damages by reason of negligence or by way of compensation or otherwise . . . shall . . . be instituted" by notice and come before the referee: sec. 4, sub-sec. (2), 1 Edw. VII. ch. 30 (O.). As to costs, I refer to *McNair v. Boyd* (1891), 14 P.R. 132; *Baskerville v. Vose* (1892), 15 P.R. 122; *Holmested & Langton*, 3rd ed., 1346; *Fitchett v. Mellow* (1898), 18 P.R. 161; *Black v. Wheeler* (1904), 7 O.L.R. 545.

*H. H. Bicknell*, for the plaintiff, *contra*. The trial Judge's construction of the Act of 1901 is right. The township is liable, as the reeve and the clerk both knew the contractor intended depositing the earth where he did on the plaintiff's land. As to the work being done by an independent contractor, I refer to *Van Egmond v. The Corporation of the Town of Seaforth* (1884), 6 O.R. 599, at p. 603.

*Clarke*, in reply.

October 23. The judgment of the Court was delivered by MABEE, J.:—The plaintiff's lands are assessed for the work that was being done in repairing the drain, in other words, she was a party to the by-law that was passed by the council for providing the funds for these repairs.

D. C.  
1906  
BURKE  
v.  
TOWNSHIP  
OF  
TILBURY  
NORTH.



D. C.  
1906  
BURKE  
v.  
TOWNSHIP  
OF  
TILBURY  
NORTH.  
Mabee, J.

The specifications prepared by the engineer provided that the earth excavated from the drain should be thrown upon the highway to the north of the drain. The contractor wished liberty to deposit some of this earth at certain cuts upon the adjacent lands to the south of the drain, and a number of owners gave their consent to his doing so. It is said the plaintiff's agent also consented to the earth being deposited upon the plaintiff's lands. His authority to give such consent is denied. Be that as it may, the whole of what is alleged as the trespass in this case is the action of the contractor in varying from the written specifications at certain portions of the work and depositing the excavated earth upon the south instead of the north bank of the drain, such variation not being objected to by the other land owners interested, and the contractor supposing the plaintiff had, through her agent, given her consent.

A purely local work was being undertaken. The township as a whole was not interested. The only persons concerned were those within the drainage area and whose lands were being taxed for the expense. The only persons particularly interested in the earth being deposited upon the north or south bank were the owners of the immediately adjacent land. Under these circumstances it was quite open to the parties to vary the specifications, with the consent of those interested, and it is contended that is all that was done. If the plaintiff gave no consent, and such has been found by the learned trial Judge to be the fact, then the deposit of the earth upon her land gave her a claim for compensation consequent upon the construction or repair of this drain. It is not contended that the contractor did more than spread the earth as the specifications provided, except that it was spread upon the south instead of the north side of the drain.

Section 93 of the Municipal Drainage Act, as found in 2 Clarke & Scully's Drainage Cases, p. 589, provides that "all proceedings to determine claims . . . arising between . . . individuals and a municipality, company or individual in the construction, improvement or maintenance of any drainage work, . . . or consequent thereon, or by reason of negligence, . . . shall hereafter be made to, and shall be heard or tried by the referee only," etc. Then sub-sec. 2 provides that these claims shall be commenced by the service of a notice setting forth the damages or compensation, and sub-sec. 5 provides that no proceeding within

the section shall be instituted otherwise than as the section provides.

The Legislature has therefore taken away the ordinary remedy by writ, and proceedings following thereon in the High Court, county court or division court, as the case might be, and provided a forum for adjusting such claims. Formerly where the party had misconceived his remedy and proceeded by writ, and it was later on discovered his claim was one for compensation under the special Act, the Court transferred his claim to the referee, and the cases are numerous where that was done. Now, however, no power exists in the Court to make any order of transfer, and where proceedings are taken for the recovery of claims that fall within sec. 93 otherwise than as provided by that section, they fail.

Section 95 provides for the local drainage area bearing the expense of working out the provisions of the Act, and where damages and costs are payable by a municipality arising from proceedings taken under the Act, all the lands and roads assessed for the drainage work contribute *pro rata* towards the payment thereof.

This plaintiff has a judgment against the defendant township for a large sum for costs payable out of the township funds generally, while had the proceedings been taken as the Act provides, the plaintiff would have obtained her compensation, and it and the expense attendant upon adjusting it, would have been borne by the lands for the benefit of which this work was undertaken.

I think it is clear that the claim of the plaintiff falls under sec. 93, and that her remedy is as that section provides, and that the action is improperly brought in the High Court.

The defendants urged other matters upon the argument that I am of opinion they would have been entitled to relief upon, but which, in view of the foregoing, it is not needful to discuss.

I think the appeal should be allowed with costs, and the action dismissed with costs throughout.

D. C.

1906

BURKE  
v.  
TOWNSHIP  
OF  
TILBURY  
NORTH.  
Mabee, J.

G. A. B.

## [IN THE COURT OF APPEAL.]

C.A.

1906

Nov. 12.

ROBINSON ET AL. V. MCGILLIVRAY ET AL.

*Bankruptcy and Insolvency—Preferential Transfer of Cheque—Deposit with Private Banker—Application by Banker upon Overdue Note—Absence of Pre-arrangement and of Intent to Prefer.*

An appeal by the plaintiff from the judgment of the Divisional Court, reported 12 O.L.R. 91, was dismissed on the ground that the transaction was a payment of money to a creditor within the meaning of the Act, R.S.O. 1897, ch. 147, sec. 3, sub-sec. 1.

THIS was an appeal by the plaintiffs from the judgment of a Divisional Court reported 12 O.L.R. 91.

The appeal was argued on the 28th of September, 1906, before MOSS, C.J.O., OSLER, GARROW and MACLAREN, JJ.A., and TEETZEL, J.

*George Gibbons*, K.C., and *G. S. Gibbons*, for the appeal. McGillivray was insolvent and Scott was well aware of that fact and did not testify to the contrary: *Davidson v. Douglas* (1868), 15 Gr. 347, at p. 351, adopted and affirmed in *Clarkson v. Sterling* (1888), 15 A.R. 234, at p. 240: *Warnock v. Klæpfer* (1888), 15 A.R. 324. This case does not come within the exception of a *bonâ fide* sale or payment in the ordinary course of trade or "payment of money to a creditor," mentioned in sec. 3 (1) of the Act, R.S.O. 1897, ch. 147. Scott should not be in any better position because he is called a banker than any other creditor would be. We refer to Hart's Law of Banking, 1st ed., p. 138; *In re National Funds Assurance Co.* (1878), 10 Ch.D. 118, at p. 128; *National Bank of Australasia v. Morris*, [1892] A.C. 287; *Schwartz v. Winkler* (1901), 13 Man. R. 493, at pp. 504, *et seq.*

*T. G. Meredith*, K.C., and *F. R. Blewett*, contra. McGillivray was not insolvent, and the trial Judge has so found. The value of his real estate proved that. The deposit was made in the ordinary every day course of business: *Stephens v. Boisseau* (1896), 23 A.R. 230, affirmed 26 S.C.R. 437. There was no transfer of any security "with intent," etc., within the meaning of sec. 2, sub-secs. (1), (2) and (3) of the statute: *Allan v. McTavish* (1883), 8 A.R. 440;

*Randall v. Dopp* (1892), 22 O.R. 422. We refer to *Gordon Mackay & Company v. The Union Bank of Canada* (1899), 26 A.R. 155; *McKinnon v. Roche* (1891), 18 A.R. 646; *Newton v. Lilly* (1906), 42 C.L.J. 440; *Misa v. Currie* (1876), 1 App. Cas. 554, at p. 564; *Paget's Law of Banking*, 237; *Benallack v. The Bank of British North America* (1905), 36 S.C.R. 120; *Thibaudeau v. Garland* (1896), 27 O.R. 391.

*G. S. Gibbons*, in reply.

November 12. OSLER, J.A.:—You may not, if insolvent and your creditor knows it, transfer a security to him in satisfaction of your debt, and if in this case McGillivray had indorsed Grant's cheque to Scott in payment of his over-due note, that would have been the transfer of a security, and the transaction could not have been supported as being the payment of money to a creditor, which is saved by the Act, sec. 3 (1): *Davidson v. Fraser* (1896), 23 A.R. 439. But there are more ways, etc.—I need not quote the proverb—and you may bring yourself within the exception by cashing the security, depositing the proceeds, and paying them in coin or notes, or by giving your creditor your own cheque for the amount of your debt: *Gordon Mackay & Co. v. The Union Bank of Canada*, 26 A.R. 155.

The creditor's right of set-off is also preserved: sec. 26; and he may set off his claim against any debt he owes to the insolvent.

Here the transaction was just what the facts shew it to have been. Scott in fact carried on business as a private banker. McGillivray kept his account with him, and he indorsed Grant's cheque for the purchase of the property he had sold to him, to Scott, to be deposited to the credit of his account, and it was so deposited in the usual way. The debtor might then have given Scott a cheque on his account for the amount of his over-due note, and that would, as I have said, have been a payment of money within the Act, just as much as if he had drawn it out and paid in coin or notes. It seems that he did in fact give such a cheque, though after Scott had debited the note in his books against his debtor's account, and in that way, as he supposed, satisfied the debt.

Either of these courses, there having been no bargain or pre-arrangement affecting the debtor's rights as customer of the bank,

C. A.

1906

ROBINSON

v.

MC

GILLIVRAY



C. A.  
1906  
ROBINSON  
v.  
Mc  
GILLIVRAY.  
Osler, J.A.

was open to the parties. Scott had really become McGillivray's debtor in the ordinary course of his banking business. If he had not charged the note against the account—if McGillivray had not given him his cheque—and the action had not been simply an action by the assignee to recover for the estate the money at the debtor's credit in Scott's hands, the latter would have had the right to set off the note against the demand: *Stephens v. Boisseau*, 23 A.R. 230. I do not see how the matter can be looked at differently because he exercised or attempted to exercise that right before action.

It is conceded that there was no fraudulent arrangement (unless the Act makes it one) or attempt to "manage" the transaction in order to put a different face on it from that which the bare relation of the facts discloses. Everything was done *bonâ fide*, and the only question is whether as presented the case is one of a fraudulent preference within the Act, or of payment of money to a creditor, or of set-off, which the Act permits. I think it may be rested on either of the latter grounds, and would therefore dismiss the appeal with costs.

GARROW, J.A.:—Appeal by the plaintiffs against the judgment of a Divisional Court affirming the judgment at the trial of Falconbridge, C.J., who dismissed the action with costs.

The action was brought by the plaintiffs, creditors of the defendant McGillivray, to have set aside as preferential and void the transfer by the defendant McGillivray to the defendant Scott of a certain cheque, under the following circumstances.

The defendant McGillivray was a merchant carrying on business at the town of Listowel. His business was evidently a failing one, and he was probably insolvent at the time of the transaction in question, although perhaps not fully aware of it, because of the excessive values which he placed on his real property.

In the month of September, 1905, he agreed to sell out his business and stock in trade to one J. R. Grant for the sum of \$1,172.27.

The defendant Scott carried on in the same town the business of a private banker, and both the buyer and seller had their bank accounts with him. And Mr. Grant, in payment of the purchase

money, gave to the defendant McGillivray his cheque upon the defendant Scott's bank for the price agreed upon. The defendant McGillivray at once deposited this cheque in the same bank, apparently in the usual and ordinary course of business, and the amount was placed to his credit and charged to Mr. Grant in their respective accounts.

When this deposit was made the defendant McGillivray was indebted to the defendant Scott upon an over-due promissory note amounting with interest to \$1,040, which had been charged up to the defendant McGillivray's account a few days before the sale to Grant, but without the knowledge of the defendant McGillivray, a circumstance which, although I mention it, I regard as of absolutely no importance. Then, a day or so after the deposit, or possibly on the same day, for the evidence is not entirely clear, but at all events after, and within two days after, the deposit, the defendant McGillivray gave to the defendant Scott his own cheque on the Scott bank for \$1,040, in payment of the note.

And the action is brought really to set aside such payment as preferential. Section 3, sub-sec. 1, of R.S.O. 1897, ch. 147, expressly excepts "any payment of money to a creditor" from the restrictive provision of sec. 2. And I can see no reason why the present enquiry should not be limited to a consideration simply of whether what took place was or was not "a payment of money" within sec. 3. Nor do I see any reason for looking at less than the whole transaction, as we were urged to do by the learned senior counsel for the plaintiffs, who earnestly desired to draw a line between the deposit, which he contended was in itself a fraudulent preference, and the subsequent giving of his own cheque by the defendant McGillivray, which he evidently considered to be much less vulnerable.

So regarding the case, the question is, in my opinion, completely covered by authority binding upon this Court against the plaintiffs' contention: see *Gordon Mackay & Co. v. The Union Bank of Canada*, 26 A.R. 155. No question of set-off or banker's lien, in my opinion, is involved. No such right was asserted by the defendant Scott. He did not refuse, it may be, because he was not asked, to allow the defendant McGillivray to withdraw in cash in whole, or in part, the proceeds of the Grant cheque. Such

C. A.  
1906  
ROBINSON  
v.  
Mc  
GILLIVRAY  
Garrow, J.A.

C. A.

1906

ROBINSON

v.

Mc

GILLIVRAY.

Garrow, J.A.

questions might and probably would have arisen but for the giving of his own cheque by the defendant McGillivray. But the giving of that cheque closed the transaction, and in my opinion absolutely put an end to all such questions.

So viewing this case, the proposition is reduced to this, that an insolvent debtor may not give his own cheque for the amount of a lawful debt, a proposition not even contended for by counsel for the plaintiff, and not only opposed to the case just cited, but to the reasoning set forth in the judgment in the case of *Davidson v. Fraser*, 23 A.R. 439, (1897), 28 S.C.R. 272.

The appeal fails and should be dismissed with costs.

MOSS, C.J.O., MACLAREN, J.A., and TEETZEL, J., concurred.

G. A. B.

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[ANGLIN, J.]

KEEWATIN POWER COMPANY V. TOWN OF KENORA,

AND

HUDSON'S BAY COMPANY V. TOWN OF KENORA.

1906

Oct. 8.

*Water and Water Courses—Navigable Rivers—Non-navigability of Portions—Riparian Proprietors—Doctrine of ad medium filum aquæ—Right of the Crown to Bed of River—Arbitration and Award—Directions to Arbitrators.*

The restriction of the presumption of the common law, as administered in England, in favour of Crown ownership of the *alveus* of navigable waters, for the protection of public rights of navigation and fishery therein, to navigable tidal waters, is apparently due to the non-recognition in early times of the necessity of protecting such public rights in other navigable waters, and an acquiescence in the right of riparian owners of lands bordering thereon to the bed of such waters, *ad medium filum aquæ*; whereas in this Province such public rights in all rivers navigable in fact have been deemed always existent in the Crown, *ex jure nature*, so that the title in the bed thereof remained in the Crown after it had made grants of lands bordering upon the banks of such rivers, the doctrine of *ad medium filum aquæ* not applying thereto.

Where a river is navigable in its general character, natural interruptions to navigation at some parts of it, which can be readily overcome, do not prevent it from being deemed a navigable river at such parts.

The Winnipeg river, which flows from the Lake of the Woods to Lake Winnipeg, is a navigable river, and although there are interruptions to navigation in it, they can be readily overcome by means of canals, or other artificial means. The channel just below the town of Kenora, which contains one of these interruptions, is properly part of the river, and must be deemed navigable in the sense mentioned, so that the bed thereof remains vested in the Crown, and nothing in the Crown grants to the plaintiffs of lands bordering upon such branch, nor in their rights as riparian proprietors, interferes with the title of the Crown to the bed, or gives to the plaintiffs any title thereto or interest therein, *ad medium filum aquæ*.

The basis upon which damages were to be assessed to the plaintiffs as owners of lands on the banks of a navigable river are set out in the report, the actions ultimately becoming actions to settle the rights of the parties, and to obtain directions to the arbitrators in expropriation proceedings.

THESE were two actions tried together at a special sittings held at Kenora, July 12th, 13th, 14th, 16th, and 17th, 1906.

As originally framed the actions were brought to restrain the municipal corporation of the town of Kenora from prosecuting expropriation proceedings instituted for the purpose of acquiring certain lands, situate on either bank of a watercourse adjacent to the town, and generally known as the east branch of the Winnipeg river. The lands on the eastern bank (mainland) are the property of the Hudson's Bay Company, and those on the western bank (Tunnel Island) are owned by the Keewatin Power Company.



Anglin, J.  
1906  
KEEWATIN  
POWER  
Co.  
v.  
TOWN OF  
KENORA.

The plaintiffs also asked declarations of certain rights which they asserted in the bed of the watercourse and in the water power which might be developed from it, and sought to prevent the defendants from carrying on works designed for the development of such water power.

The facts so far as material are set out in the judgment.

*Wallace Nesbitt, K.C., and J. Jennings*, for the plaintiffs, the Keewatin Power Company.

*F. H. Phippen, K.C., and C. A. Moss*, for the plaintiffs, the Hudson's Bay Company.

*N. W. Rowell, K.C., G. Wilkie and A. McLennan*, for the defendants.

*W. H. Hearst*, for the Attorney-General of Ontario.

October 8, 1906. ANGLIN, J.:—In 1892 the plaintiffs, the Hudson's Bay Company, leased part of their lands on the eastern bank for a term of ten years to Messrs. McCrossen and Rideout for the purpose of establishing electric light and power works. The lessees took possession of these lands and constructed works on a small scale, using for their purposes a portion of the waters of the watercourse in question. In 1894 the term was extended to twenty years, subject to a provision for cancellation upon notice. This lease was at a later date transferred to the Citizens' Telephone and Electric Power Company of Rat Portage, which made a further development of the water power, and supplied the town of Rat Portage and its citizens with electric light, etc. By Provincial statute, 2 Edw. VII. ch. 62, the defendants were authorized to acquire, and they subsequently purchased and took over, the power plant and works of the Citizen's Telephone and Electric Company. The plaintiffs, the Hudson's Bay Company, had meantime given a notice of cancellation to the Citizen's Company, under which they allege that all rights under the lease above mentioned expired on the 29th March, 1902. The defendants, however, took possession of the lands covered by the lease and of the plant and works under their assignment from the Citizens' Company. They then conducted negotiations with the Hudson's Bay Company for the purchase from them of the lands theretofore leased to Messrs. McCrossen & Rideout. These negotiations

proved unsuccessful, because of the differences between the parties which it is the purpose of these actions to determine; and, in 1903, the defendants procured from the Legislature authority for the expropriation of such lands on either side of the watercourse as should be required for the power development which they contemplated making. In 1905 the defendants obtained from the Crown, as represented by the Government of the Province of Ontario, what purports to be a lease of the bed of the watercourse in question. They then proceeded with blasting and other works for the development of power in this watercourse, having first given notices of expropriation of the lands upon the banks under their statutory powers. Arbitrators were duly appointed, etc. An order made by the district court Judge requiring the plaintiffs, upon payment into court of a comparatively trifling sum, to deliver to the defendants immediate possession of the lands, for the expropriation of which notices had been given, precipitated the present actions.

¶ In the course of the trial before me, by arrangement between the parties, made with my approval, all objections by the plaintiffs to the sufficiency and regularity of the expropriation proceedings of the defendants were waived; the claim for injunction was withdrawn; the lands, described in the expropriation notices given by the defendants were conceded to be requisite for their purposes; and it was agreed "that issues should be tried to settle the rights of the parties and obtain directions to arbitrators as to what basis damages by way of compensation are to be assessed on, whether as owners of bed of river in addition to land, or as owners of land only, and in such case to define rights to be taken into consideration by arbitrators": Certain other minor difficulties were also adjusted.

As a result of this very sensible arrangement the development works of the defendants at Kenora are proceeding. The Court is now asked to determine for what the plaintiffs are entitled to claim compensation—whether (a) merely for the value of the lands on the respective banks of the watercourse which the defendants purpose taking from them; or (b) also for the value of the adjacent bed and the water power which may be developed from the watercourse lying between the lands of the Hudson's Bay Company and those of the Keewatin Power Company; or

Anglin, J.

1906

KEEWATIN  
POWER  
Co.

v.

TOWN OF  
KENORA.

Anglin, J.  
1906  
KEEWATIN  
POWER  
Co.  
v.  
TOWN OF  
KENORA.

(c) for the value of the lands upon the banks coupled with such rights in the waters flowing past them as the plaintiffs are entitled to as riparian owners.

At the opening of the trial, counsel for the defendants directed attention to the fact that the title of the Crown to the bed of the river, and to the water power in question, asserted by the lease to the defendants, is denied by the plaintiffs, and asked that the Attorney-General for Ontario be added as a party defendant in each action. Counsel for the plaintiffs opposed that motion. Upon being asked if he would assent to this being done, Mr. Hearst, who appeared for the Attorney-General, requested an opportunity to obtain specific instructions. He subsequently stated that the Attorney-General declined to consent to be made a party, and I thereupon refused Mr. Rowell's motion: See *Eddy v. Booth* (1906), 7 O.W.R. 75. Mr. Hearst continued, however, to watch the proceedings on behalf of the Attorney-General.

Much evidence at the trial and not a little strenuous argument was directed to the question whether the watercourse, with which we are dealing, should be deemed part of the Winnipeg river, and should be regarded as part of a stretch of navigable water, or should be held to be a non-navigable stream, connecting two considerable lake-like expanses of navigable waters, neither of which forms part of a river. Upon this branch of the case I have had the advantage not merely of the oral testimony adduced, but also of the view, which, at the request of all parties, I took of the waters immediately in question and waters adjacent thereto. Upon this inspection of the river my conclusions as to the character of the waters at the point in dispute are largely based.

The town of Kenora is situated at the northern end of the Lake of the Woods. This large and important body of water, studded with countless islands, extends some 80 miles southerly from Kenora to the mouth of the Rainy river, which flows into it, and which forms part of the international boundary between Canada and the United States of America. Its width varies. In some places it is many miles wide, its area being about 2,000 square miles. It is said by some witnesses that formerly there were several natural exits for the waters of this lake. To-day there are but two, known as the east and west branches of the Winnipeg river, and, upon the evidence, I find that there never was any other

natural outlet. These two outlets—the western carrying about three or four times as much water as the eastern—are three-quarters of a mile apart, being separated by Tunnel Island.

The western branch is several hundred feet wide and is crossed by a costly and apparently effective regulating power dam constructed by the Keewatin Power Company. The eastern branch, about 60 feet wide, carries a considerable volume of water, which, for a short distance, rushes down what may be described as almost a gorge, having at one point an abrupt fall of some 15 feet. The length of this “branch” is about 8,000 feet, measured from the waggon bridge to the north end of Old Fort Island. The total fall, some 18 feet, occurs in a distance of a few hundred feet. Above and below the falls this branch is itself navigable. Upon the whole evidence I find that the minimum volume of water flowing through this east branch is and always has been capable of producing in the natural condition of the stream, upon development, at least 4,000 horse power. Below the point at which the waters of the eastern and western branches or outlets meet, there is another lake-like expanse of waters, varying in width, containing many islands, and with very little, if any, defined current. Though much smaller than the Lake of the Woods, this body of water is not at all dissimilar in character.

For many years geographers appear to have treated the Winnipeg river as beginning at the head of the two outlets from the Lake of the Woods. All the maps and documents produced, many of them of a public character, refer to the outlets of the lakes as branches of the river. The proper finding upon all the evidence is, in my opinion, that the Winnipeg river commences at the points of outlet from the Lake of the Woods, and that the expanse below the falls of the east and west branches, and those branches themselves, as well, form part of that river.

Of the non-navigability of both branches, for a short distance in each, there cannot be any question whatever. The waters below, as well as above, are, however, in my opinion, unquestionably navigable. They afford a route for carriage by water of considerable commercial importance, extending in an otherwise unbroken stretch for some 114 miles. The traffic upon the Lake of the Woods has been for many years past, and is still considerable. It is navigable for fairly large steamboats for a distance of 80 miles

Anglin, J.

1906

KEEWATIN  
POWER  
Co.

v.

TOWN OF  
KENORA.



Anglin, J.

1906

KEEWATIN

POWER

Co.

v.

TOWN OF

KENORA.

south of Kenora. North of Kenora, after the falls and rapids in the east and west branches are passed, the Winnipeg river broadens out and is navigable for at least 34 miles by small steam-boats, some three or four of which ply up and down, carrying freight and a few passengers. At a point 7 miles north of Kenora the first rapids occur. They are not sufficient to interrupt navigation. From a point 34 miles north of Kenora the navigation of the river becomes more difficult, numerous portages being necessary before Lake Winnipeg, 163 miles distant from Kenora, is reached. But in this distance there are several stretches of good water about 20 miles in length, capable of carrying boats drawing 5 or 6 feet. This river for many years served as part of the trade route for the Hudson's Bay carriers from the east to Fort Garry and other points. York boats, with a capacity of 20 tons, were navigated up and down it. The volume of water flowing down the river is at all points such that, if natural obstacles were overcome by canals or other artificial means, a route for navigation from Lake Winnipeg to Fort Francis would be quite feasible. Even in its present condition its value as a trade route is not inconsiderable, though, since the advent of railways, it is no longer travelled as it was in bygone days. Yet from Fort Francis 80 miles down the Lake of the Woods to Kenora, and from Kenora northwards to the crossing of the Transcontinental Railway—25 to 30 miles farther—Mr. Henry Ruttan, a witness for the plaintiffs, upon whose testimony I feel that I may rely, says the waterway is of very great value, adding that the natural impediment to navigation presented by the falls in the east branch of the river can be easily overcome by means of a canal.

"It is the adaptation of a stream to purposes of navigation, and not the being adopted in use, that renders it a navigable river:" *Regina v. Meyers* (1853), 3 C.P. 305, at p. 349; see, too, pp. 350-2.

All rivers which afford a common passage, not only for large vessels, but for boats or barges, are public highways: *Esson v. McMaster* (1842), 1 Kerr N.B. 501.

All rivers which may be used for the transportation of property are public highways: *Rowe v. Titus* (1849), 1 Allen, N.B. 226, 329.

"Those streams which are sufficiently large to bear boats or barges, or to be of public use in the transportation of property, are highways by water, over which the public have a common

right": *per* Burton, J.A., in *McLaren v. Caldwell* (1881), 6 A.R. 456, at p. 489, citing *Wadsworth v. Smith* (1834), 11 Me. 278, 280, which is also cited with approval in *Rowe v. Titus* (*sup.*).

In *The Montello* (1874), 20 Wallace, 430, Davis, J., delivering the opinion of the Supreme Court of the United States, says at pp. 441, 442 and 443:—

"The true test of the navigability of a stream does not depend on the mode by which commerce is, or may be, conducted nor the difficulties attending navigation. . . . It would be a narrow rule to hold that in this country, unless a river was capable of being navigated by steam or sail vessels, it could not be treated as a public highway. The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway. Vessels of any kind that can float upon the water, whether propelled by animal power, by the wind, or by the agency of steam, are, or may become, the mode by which a vast commerce can be conducted, and it would be a mischievous rule that would exclude either in determining the navigability of a river. It is not, however, as Chief Justice Shaw said, 'every small creek in which a fishing skiff or gunning canoe can be made to float at high water which is deemed navigable, but, in order to give it the character of a navigable stream, it must be generally and commonly useful to some purpose of trade or agriculture.'

The learned Judge of the court below rested his decision against the navigability of the Fox river below the De Pere rapids chiefly on the ground that there were, before the river was improved, obstructions to an unbroken navigation. This is true, and these obstructions rendered the navigation difficult, and prevented the adoption of the modern agencies by which commerce is conducted. But with these difficulties in the way, commerce was successfully carried on, for it is in proof that the products of other states and countries were taken up the river in its natural state from Green Bay to Fort Winnebago, and return cargoes of lead and furs obtained. And the customary mode by which this was done was Durham boats. . . . The

Anglin, J.  
1906

KEEWATIN  
POWER  
Co.  
v.  
TOWN OF  
KENORA.

Anglin, J.  
1906  
KEEWATIN  
POWER  
Co.  
v.  
TOWN OF  
KENORA.

rule laid down by the district Judge as a test of navigability cannot be adopted, for it would exclude many of the great rivers of the country which were so interrupted by rapids as to require artificial means to enable them to be navigated without break. Indeed, there are but few of our fresh water rivers which did not originally present serious obstructions to an uninterrupted navigation. In some cases, like the Fox river, they may be so great, while they last, as to prevent the use of the best instrumentalities for carrying on commerce, but the vital and essential point is whether the natural navigation of the river is such that it affords a channel for useful commerce. If this be so the river is navigable in fact, although its navigation may be encompassed with difficulties by reason of natural barriers, such as rapids and sand-bars."

This decision is cited with approval in the recent case of *United States v. Rio Grande Dam and Irrigation Co.* (1898), 174 U.S.R., 690, 698. See, too, *Broadnax v. Baker* (1886), 94 N.C. 675; Farnham on Waters, pp. 125, 127.

Applying these definitions of navigability, I have little hesitation in holding that the Winnipeg river, said to carry a volume of water little inferior to that of the Ottawa, formerly a great channel of commerce and still of considerable value as a trade route, must be deemed a navigable river. There can be no question whatever of the navigation in fact at the present time of the waters of this river for 34 miles below the falls of the east branch at Kenora and of the waters of the Lake of the Woods for 80 miles above Kenora. This east branch, whether regarded as part of the Winnipeg river, as I think it should be, or as a distinct stream, is unquestionably a link in a great stretch of navigable waters of considerable commercial value and importance, in the course of which occurs, in a distance of 114 miles, but one natural impediment to navigation. Such is the character of the watercourse in which it becomes necessary to determine the extent of the rights of riparian proprietors, which the plaintiffs certainly are.

The Keewatin Power Company, Limited, are, by grant from the Government of Ontario, dated the 30th April, 1894, owners of the whole of Tunnel Island, excepting only the right of way of the Canadian Pacific Railway Company across the island.

The Hudson's Bay Company claim to have had title, under grant and charter of His late Majesty, King Charles II., to a vast



territory lying north and west of the Great Lakes, which included the lands in question. By deed of surrender, executed in November, 1869, the Hudson's Bay Company relinquished to the Crown all their rights of government over this great territory and title to all the lands comprised in it, excepting certain reserved strips or blocks occupied by and in proximity to their established trading posts, the lands so retained to be selected and to amount in all to 50,000 acres. Upon the eastern bank of the east branch of the Winnipeg river the company at first stipulated for a reservation of 50 acres. But, the lands selected at their various posts being somewhat less than the 50,000 acres agreed upon, in 1872, under an order-in-council of the Government of the Dominion of Canada, to which the British Government had transferred the lands relinquished by the company, the company was allowed to select "additional tracts of land" to complete the area of 50,000 acres for which it had stipulated. It then asked for and obtained the right to retain a block of 690 acres at Rat Portage. These lands were surveyed and laid out by Charles F. Miles, P.L.S., under instructions from the Minister of the Interior. They border on the Lake of the Woods and the east branch of the Winnipeg river. In 1887 the Government of the Province of Ontario, at the request of the Dominion authorities, issued a patent to the Hudson's Bay Company for this tract of 690 acres, laid out by Miles. The Hudson's Bay Company assert that this patent was merely confirmatory of a title which they had from the time of the grant of Charles II., and retained by virtue of their reservation of 50,000 acres from the surrender to the Crown in 1869. This the defendants do not admit, claiming that the Hudson's Bay Company's title rests solely upon the patent of 1887 from the Government of Ontario.

The deed of surrender from the Hudson's Bay Company to the Crown excepts the reserved lands in these terms:—

"2. The company to retain all the posts or stations actually possessed and occupied by them or their officers or agents, whether in Rupert's Land or any other part of British North America, and may within twelve months after the acceptance of the said surrender select a block of land, adjoining each of their posts or stations, or within any part of British North America, not comprised in Canada and British Columbia in conformity, except as regards the Red river territory, with a list made out by the company,

Anglin, J.

1906

KEEWATIN

POWER

Co.

v.

TOWN OF

KENORA.



Anglin, J.

1906

KEEWATIN

POWER

Co.

v.  
TOWN OF

KENORA.

and communicated to the Canadian ministers, being the list in the annexed schedule. The actual survey is to be proceeded with with all convenient speed."

"4. So far as the configuration of the country admits, the blocks shall front the river or road by which means of access are provided, and shall be approximately in the shape of parallelograms, and of which the frontage shall not be more than half the depth."

At Rat Portage the company's reservation, according to the schedule annexed to the deed of surrender, was restricted to 50 acres. What portion of the 690 acres eventually granted these 50 acres comprise it is impossible to say. The increase in the area allotted to the company at Rat Portage is explained by a report of the Deputy Minister of the Interior to have been "the result of subsequent arrangement between the company and the Government." The order-in-council of the Ontario Government shews that the patent for the 690 acres was issued on the recommendation of the Minister of Crown Lands, stating that "it is proper that the agreement entered into by the Government of Canada with the Hudson's Bay Company in the years 1870 and 1872 should be carried out in good faith."

The Ontario patent issued to and accepted by the Hudson's Bay Company grants to them "a parcel or tract of land . . . containing by admeasurement six hundred and ninety acres, be the same more or less, being composed of a block of lands as shewn by a plan of survey by provincial land surveyor Charles F. Miles, dated January 7th, 1875 . . ." This plan shews the plot of 690 acres to extend to the water's edge of the Lake of the Woods and of the east branch of the Winnipeg river.

Applying ordinary canons of construction, the position of the Hudson's Bay Company should be rather better under the patent from the Ontario Government than under the earlier title, which the company asserts, since a reservation in their deed of surrender would be restricted to that which it expresses, rather than extended to include incidental rights not in terms reserved: *Bullen v. Dunning* (1826), 5 B. & C. 842, 849, 850. These plaintiffs are of course entitled to the full benefit of the patent from the Government of this Province, which they have accepted, and which they produce in evidence of their title. I find nothing in the terms of the reservation in the deed of surrender that would aid them,

in maintaining a construction of it, which would assist their present claim. I cannot, therefore, see that their claim of title by reservation, if conceded, would at all improve their position or confer rights wider or more extended than those assured to them by their Provincial patent

Mr. Rowell contended that because the plaintiffs' grants are from the Crown they must receive a construction which would confine the subject matter of the grants strictly to that which is explicitly described. In *Lord v. Commissioners of Sydney* (1859), 12 Moo. P.C. 473, it was held that a Crown grant of lands, bordering upon a non-navigable creek, carried title to the bed *ad medium filum*, and the judgment of the Judicial Committee, at p. 496, thus disposed of the contention now made by Mr. Rowell:—

“It is unnecessary for their Lordships to say more on this point, because they are clearly of opinion, that upon the true construction of this grant, the creek where it bounds the land is, *ad medium filum*, included within it. In so holding they do not intend to differ from old authorities in respect to Crown grants; but upon a question of the meaning of words, the same rules of common sense and justice must apply, whether the subject matter of construction be a grant from the Crown, or from a subject; it is always a question of intention, to be collected from the language used with reference to the surrounding circumstances . . . “Words in an instrument of grant, as elsewhere, are to be taken in the sense which the common usage of mankind has applied to them in reference to the context in which they are found. If lands granted were described as bounded by a house, no one could suppose the house was included in the grant; but if land granted were described as bounded by a highway, it would be equally absurd to suppose that the grantor had reserved to himself the right to the soil *ad medium filum*, in the far greater majority of cases wholly unprofitable.”

See, too, *Attorney-General v. Scott* (1904), 34 S.C.R. 603, 615.

Nor does the fact that the Hudson's Bay Company's lands are described as a parcel shewn upon a plan, which indicates the water's edge as one of the boundaries of the parcel, at all affect the rights of the grantee. These rights are precisely the same as if the lands had been described by metes and bounds and as extending to and lying along the water's edge: *Micklethwait v. Newlay Bridge Co.*

Anglin, J.

1906

KEEWATIN  
POWER  
Co.

v.  
TOWN OF  
KENORA.

Anglin, J.

1906

KEEWATIN

POWER

Co.

v.

TOWN OF

KENORA.

(1886), 33 Ch.D. 133, 145; *Kirchoffer v. Stanbury* (1878), 25 Gr. 413, 418; *Smith v. Millions* (1889), 16 A.R. 140.

In the case of the Hudson's Bay Company, therefore, subject to some reservations in their grant with which I shall deal presently, the question is squarely presented, does a grant from the Crown of lands of defined area, extending to the water's edge of such a stream as the east branch of the Winnipeg river, carry with it title to the river bed *ad medium filum*, and to the superjacent waters and the right to any power that may be developed from them.

Subject to the effect of special terms in the grant to the Kewatin Power Company, which must be separately dealt with, the same question arises upon that instrument.

The plaintiffs maintain that the English rule, under which a grant of lands upon the banks of non-tidal waters entitles the grantee to claim that his lands extend *ad medium filum aquæ*, is in full force in this Province; they further contend that as riparian owners, though the alveus *ad medium* should not be held to be included in the grant to them from the Crown, they are entitled to the use—ordinary and extraordinary—of the waters flowing past their lands; they also assert that in any case the titles of riparian owners *primâ facie* extend to mid-stream in such portions of navigable rivers as are non-navigable owing to natural impediments. The defendants, while fully admitting the common law doctrine prevalent in England, maintain that a different rule must obtain on this continent; that the rule that the ownership of the alveus remains in the Crown, confined in England to tidal waters, must here be extended to all waters navigable in fact; that where the waters above and below are navigable, a short watercourse connecting such navigable waters, though obstructed by a non-navigable fall or rapid, must be deemed part of a navigable stretch of water; and that the rights of riparian owners along such obstructed watercourse are the same as those of riparian proprietors whose lands border upon the main bodies of water above and below. They further maintain that any extraordinary use of the waters of a stream, such as for purposes of power development, is incident to the ownership of the alveus, and is not the right of a proprietor whose lands extend only to the water's edge.

The doctrine of the common law as administered in England that, whereas in tidal navigable waters the title to the alveus is



presumed to remain in the Crown unless expressly granted, in all non-tidal rivers, whether in fact navigable or non-navigable, the title to the alveus is presumed to be in the riparian proprietors, is too long and too clearly established to admit of any controversy. Upon the applicability of the latter portion of this rule to navigable non-tidal rivers in Ontario, and to non-navigable portions of navigable water stretches, the parties are at issue. Counsel for the plaintiffs concede, however, that whereas in England, upon waters non-tidal but navigable in fact, the public right of navigation depends upon some Act of Parliament; or upon express dedication or prescription, in Ontario, as in the United States, this right exists *jure naturæ* and independently of any statute, proven grant, or presumption from user. This conceded modification of the English doctrine is well warranted by authority: *Regina v. Meyers* 3 C.P. 305, 346, 351, and many later cases; see, too, *Caldwell v. McLaren* (1884), 9 App. Cas. 392, at p. 405.

How far, if at all, the doctrines of the English common law are to be otherwise modified in their application to the rivers and lakes of this Province is the principal question for determination in these actions. Upon this subject we have had some valuable expressions of judicial opinion in our own courts. There has also been much discussion in the courts of the United States upon the same question, which has frequently arisen in various States of the Union.

In delivering judgment in *Re Provincial Fisheries* (1895), 26 S.C.R. 444, at p. 451, Strong, C.J., after pointing out that the right of fishery is vested, as an incident of property, in the owners of the beds of rivers and lakes, says, at p. 521:—

“In the case of non-navigable waters riparian proprietors on one side whose grants are bounded by the stream are entitled to the property in the bed of the river to its middle thread. This rule, however, is not applicable to the Great Lakes of Canada, and to rivers which are *de facto* navigable, for the reasons given in the Ontario cases before cited.” At p. 520 his language is: “Nor do I think the rule in question applies even to such rivers as are specifically mentioned in the first question propounded to us, or other non-tidal rivers which are *de facto* navigable. It appears, from several cases decided in the courts of the Province of Ontario, that such lakes and rivers are to be considered navigable waters,

Anglin, J.

1906

KEEWATIN  
POWER  
Co.  
v.TOWN OF  
KENORA.



Anglin, J.

1906

KEEWATIN

POWER

Co.

v.

TOWN OF

KENORA.

and that the rule of the English law as to navigable tidal waters applies to them. I refer particularly to the cases of *Parker v. Elliott* (1852), 1 C.P. 470; *The Queen v. Meyers*, 3 C.P. 305; *The Queen v. Sharp* (1869), 5 P.R. 135, at p. 140; *Gage v. Bates* (1858), 7 C.P. 116; *Dixson v. Snetsinger* (1873), 23 C.P. 235. It is true that the right of fishing was not in question in any of these cases, the point in controversy in each of them having been the right of the riparian owner claiming under a grant from the Crown to the property in the bed of the river or lake opposite their land frontage. It follows, however, from the reasoning of the Courts, that such navigable waters were to be likened in all respects to rivers which, according to the common law, came within the definition of navigable rivers." At p. 527 he says: "Assuming that the Upper Canada cases before cited of *Parker v. Elliott*, 1 C.P. 470; *The Queen v. Meyers*, 3 C.P. 305; *The Queen v. Sharp*, 5 P.R. 140, and *Dixson v. Snetsinger*, 23 C.P. 235, were well decided, as I hold they were, the soil of all non-tidal navigable rivers, so far as it has not been expressly granted by the Crown, was, at the date of confederation, vested in the provinces."

Though perhaps not essential to the disposition of the question which he was answering, and not authoritative as a judgment *inter partes*, this emphatic expression of opinion by a late Chief Justice of Canada is certainly entitled to the greatest weight.

In *Barthel v. Scotten* (1895), 24 S.C.R. 367, the head note of the case reads: "A grant of land bounded by the bank of a navigable river, or an international waterway, does not extend *ad medium filum* as in the case of a non-navigable river." The Court was here dealing with the river Detroit. Strong, C.J., in the course of his judgment, in which Taschereau and Sedgewick, JJ., concurred, said, at p. 370: "There can be no doubt that situate, as this lot 43 is, on a large navigable river, an international waterway, the water's edge forms the western boundary. A grant of land bounded by the banks or edges of such streams does not extend to the middle thread as is the case where lands described as so limited lying on the banks of non-navigable rivers are granted." Here again it was perhaps not strictly necessary to the decision of the case in hand to determine the question upon which the learned Chief Justice expresses such a decided view.

In *Regina v. Robertson* (1882), 6 S.C.R. 52, in which the Court dealt with a portion of the river Miramichi in New Brunswick held to be non-navigable, though again *obiter*, we find the same learned Judge saying at p. 129: "Whilst I do not hesitate to say that the rule which appears to have been adopted as a principle of the common law as administered in England that no rivers are to be considered in law as public and navigable waters above the ebb and flow of the tide, is not applicable to the great rivers of this continent, as has been determined by the Supreme Court of the United States and by the Courts of most of the States, and whilst I think that with us the sole test of the navigable and public character of such streams is their capacity for such uses, etc."

In *Ratté v. Booth* (1887), 14 A.R. 419, at p. 439, Burton, J.A., in the course of a dissenting judgment says:

"A grant of lands on the side of non-navigable streams, in the absence of evidence to the contrary, conveys the soil of the bed to the middle of the stream; on the other hand, any grant of land by the Crown on the banks of a navigable river, like the Ottawa would, *primâ facie*, be bounded by the edge of the stream. It requires an absolute grant of the bed of the stream, there being no presumption of law, in such a case, that the ownership of the bed of the river goes along with the ownership of the shore."

In *Parker v. Elliott*, 1 C.P. 470, the Court, dealing with lands abutting on Lake Ontario, held that the property of their owner terminated at the high water mark. Though the decision proceeds rather upon the wording of the patent, which reads "to the lake" and "along the bank," the Judges discuss the rule now under consideration. At p. 489, Sullivan, J., says: "However inapplicable this rule may be to such rivers as the Saint Lawrence and Ottawa, and more especially to the Great Lakes, to such waters as Lake Simcoe, Lake Saint Clair, or even to the Rice lakes, we have no common law to guide us but that of England; and it would seem to follow that the plaintiff, as riparian proprietor of lot 24, is entitled to all the land covered with water to the Provincial boundary line in the middle of Lake Ontario, and the consequence would be that any accretion of land from the waters of the lake, whether in the shape of islands or otherwise, would belong to the riparian proprietor. . . . I am of opinion, however, that if the question comes to be settled without legislative interference in this country

Anglin, J.

1906

KEEWATIN  
POWER  
Co.  
v.  
TOWN OF  
KENORA.

Anglin, J.

1906

KEEWATIN

POWER

Co.

v.

TOWN OF

KENORA.

our great rivers and lakes will not be held to be of the description of waters such as in England are above the rise and fall of the tide; all the practice of the land granting departments in the country shew a different impression to have prevailed in all our harbours, and even upon the interior lakes water lots have been granted outside of the land of the riparian proprietors, and islands such as Barnhart's Island in the Saint Lawrence, Wolfe's Island, the whole of the Thousand Islands, the Allumette and Calumet Islands in the Ottawa, islands in the Detroit and Saint Clair Straits, and all others similarly situated, have been treated as belonging to the Crown, notwithstanding grants on the shore to riparian proprietors; so that either the rule of the common law of England has been by common and universal interpretation most reasonably held not to apply to the lakes and great rivers of Canada, or else the whole of the lands of riparian proprietors, being held under grants from the Crown, containing boundaries defined in writing—these boundaries, when running to the water's edge, the bank of the water, the lake or the river, must be taken to extend no further, and to leave the land covered with water ungranted and the property of the Crown. It appears to me, therefore, that we must hold the grant now in question to extend to the edge of the lake and no farther."

In *Regina v. Meyers*, 3 C.P. 305, which was a case of obstruction to navigation in the river Sydenham, and therefore involved no question of title to the bed of the stream, Macaulay, C.J., very elaborately discusses the law governing the rights of the public and of private riparian owners in Upper Canadian rivers navigable in fact. At p. 351 he says:—

"When the territory now forming Upper Canada was devoted to settlement, the use of all streams practicable for navigation (if not already the common right of all His Majesty's subjects throughout the Empire as a national interest) may be justly considered as dedicated to the public use upon the principles of, first, the civil, and afterwards the common law, so that although not pre-occupied by public use, they are to be looked upon as open to the public."

Although he refrains from explicitly so determining, the language of the Chief Justice, at p. 350, indicates that in his

opinion the bed of such a stream would not pass except by a grant conveying it in express terms.

McLean, J., at p. 357, says: "Without therefore attempting to find in English cases any distinct authorities to guide us in the decision of questions relating to streams at the distance of some thousand miles from the influence of the tides, I have no hesitation in stating it as my opinion that the great lakes and the streams which are in fact navigable, and which empty into them in these Provinces, must be regarded, as vested in the Crown in trust for the public uses for which nature intended them—that the Crown, as the guardian of public rights, is entitled to prosecute and to cause the removal of any obstacles which obstruct the exercise of public right, and cannot by force of its prerogative curtail or grant that which it is bound to protect and preserve for public use."

In *Gage v. Bates*, 7 C.P. 116, the title to the inlet of Burlington Bay was in question. It was only necessary to determine the existence of the public right of navigation, but Richards, J., says at p. 122:—

"There are several cases decided in our own Courts, which, if we may judge by the digest of them, such as *Moffat v. Roddy*, (1838) Michaelmas Term, 2 Vict., seem to confirm the doctrine that our large lakes and navigable rivers and inland waters are to be viewed as navigable rivers at the common law. I have not been able to see these cases, as they are not reported, but I understand their effect to be as I have stated. The American cases on the subject vary in different States and afford no certain rule."

In *Attorney-General v. Perry* (1864), 15 C.P. 329, which was not very satisfactorily presented to the Court, the decision was that the lands under the waters of Lake Ontario belong, not to the grantees of the adjacent lands upon the banks, but to the Crown.

Richards, C.J., says at p. 331:—"In this country the practice has obtained in towns and cities for the Crown to grant lands covered with water, and generally to the owner of the bank when adjacent to a navigable stream, and grants so made have never been cancelled for want of power in the Crown to make the grant."

In *Dixon v. Snetsinger*, 23 C.P. 235, Gwynne, J., cited the foregoing cases; but, without drawing any conclusions from them, he proceeds to determine that because the portion of Upper

Anglin, J.

1906

KEEWATIN  
POWER  
Co.  
v.  
TOWN OF  
KENORA.



Anglin, J.  
1906  
KEEWATIN  
POWER  
Co.  
v.  
TOWN OF  
KENORA.

Canada lying north of the River St. Lawrence was formerly part of the Province of Quebec, property rights in that river are governed not by the English common law introduced by the Provincial Statute, 32 Geo. III. ch. 1, but by the civil law which prevailed in Canada before the conquest and which was continued in the Province of Quebec by the Imperial Statute, 14 Geo. III. ch. 83. This decision affords no assistance in the present case, which concerns property rights in a water course situate in territory which never formed part of the Province of Quebec. Gwynne, J., in *The Queen v. Robertson*, 6 S.C.R. at p. 78, points this out. See, however, the views expressed by Strong, C.J., in the *Fisheries* case, 26 S.C.R., at pp. 529, 531.

At p. 245 of the report in 23 C.P., this significant passage is found:—

“Is the language of this Provincial statute sufficient, and is its object, to introduce this rule of the common law as to navigable waters, which, when applied to rivers in an insular country such as England, may be perfectly consistent with reason and common sense, but which is neither conformable to reason or common sense when applied to such a river as the St. Lawrence, which is not only a highway dividing the territories of different nations for the greater part of its extent, but which traverses more than half a continent, and with a little assistance from art is navigable for vessels navigating the ocean far more than 1,500 miles above tide waters, and which in its course forms lakes more than 100 miles in width.”

In *Warin v. London and Canadian* (1885), 7 O.R. 706, Wilson, C.J., at p. 722, says:—“The Crown, in my opinion, is the owner of the soil in these large lakes just as much so as it is of the soil of the sea, and in the rivers where there is the ebb and flow of the tide, and also of the soil in the bays of the lakes as part of the same, at any rate of such of them as are navigable.”

Again at p. 723: “Then take Lake Superior, which is about five times as large as Lake Ontario. Is the law applicable to it to be governed by the law applicable to Lough Neagh? It is clear the proprietors of land on the shores of these lakes do not own the soil *ad filum aquæ*, and I adopt, without hesitation, the law laid down by the American cases referred to in Gould on Waters.”

In *Re Miller and Great Western R.W.* (1856), 13 U.C.R. 582, it was admitted that a grant of land bounded by Burlington Bay only carried title to the water's edge: see p. 590.

In *Regina v. Sharp*, 5 P.R. 135, Wilson, J., treated it as settled law that the Great Lakes are not subject to the rule of the common law as to the flux and influx of the tide being necessary to constitute a body of water a navigable river.

In *Kains v. Turville* (1871), 32 U.C.R. 17, and in *Re Trent Valley Canal* (1886), 12 O.R. 153, cited at bar, the Court dealt with admittedly non-navigable streams.

In none of these cases does the question now presented appear to have been expressly decided. But the expressions of opinion quoted from Judges of eminence are so clear and numerous that they seem entitled to be accorded the weight of binding authorities. What is there to be found against them?

In regard to rivers which are in fact non-navigable the English rule unquestionably prevails: *Massawippi Valley R.W. Co. v. Reed* (1903), 33 S.C.R. 457, 468-9; *The Queen v. Robertson*, 6 S.C.R. 52.

In *Lord v. Commissioners of Sydney*, 12 Moo. P.C. 473, the Court held that a non-navigable creek in New South Wales was subject to the English common law rule. Although this case was much relied upon by counsel for the plaintiffs, I find in it little to assist me upon the question now under consideration.

In *Caldwell v. McLaren*, 9 App. Cas. 392, at p. 404, Lord Blackburn says:—

"They" (the members of the Judicial Committee) "think that there can be no doubt that by the law of England the owner of the soil on both sides of a running stream, whether it be navigable or not, is, *primâ facie* at least, owner of the soil which forms the bed of the stream." This is the strongest statement which I find in support of the view that the common law, as it obtains in England, should be applied in this country to rivers non-tidal though navigable in fact. But not only was Lord Blackburn's dictum distinctly *obiter*; it occurs in a case in which the question now being dealt with was not presented for decision, and it is scarcely conceivable that it can have been discussed in argument. Moreover, Lord Blackburn does not, at all events expressly, say that this portion of "the law of England" prevails in Ontario.

Anglin, J.

1906

KEEWATIN

POWER

Co.

v.

TOWN OF

KENORA.

Anglin, J.  
1906  
KEEWATIN  
POWER  
Co.  
v.  
TOWN OF  
KENORA.

In *Re McDonough* (1870), 30 U.C.R. 288, it was held that the limits of the city of London extended to the middle of the River Thames, which formed the boundary between that city and the township of London. Though the Court does not advert to the fact, it is notorious that the River Thames is, at and above the city of London and for some distance below, non-navigable. The language of the judgment delivered by Morrison, J., declaring the *ad medium* doctrine applicable may be wide enough to include navigable rivers, but it is obvious that the Court could not have intended to lay down a rule applicable to such waters.

I find no other reported case in this Province or in England which throws any light upon the question how far our non-tidal navigable waters should be deemed subject to the *ad medium*—of the English common law.

The weight of judicial opinion of authority in this Province distinctly supports the view that the soil of our rivers navigable in fact is presumed to remain in the Crown unless expressly granted.

The American authorities afford little assistance. The Supreme Court of the United States has held in many cases that grants of land bounded by waters, made without reservation, must be construed according to the law of the State in which the lands lie: *Hardin v. Jordan* (1891), 140 U.S.R. 371; *Mitchell v. Smale* (1891), *ib.* 406; *Grand Rapids and Indiana R.W. Co. v. Butler* (1895), 159 U.S.R. 87. In Illinois, Mississippi, Michigan, New York, Wisconsin, and many other States, it has been held that the *ad medium* rule of the English common law applies to all non-tidal rivers. In Pennsylvania, California, Iowa, and most of the western States, it is held that this rule does not apply to rivers navigable in fact.

The Supreme Court of the United States in *The Genesee Chief v. Fitzhugh* (1851), 12 Howard 443, held that the Great Lakes and the navigable waters connecting them are subject to admiralty jurisdiction. "These lakes are in truth inland seas." In New York and some other States, rivers forming the international boundary are held not to be subject to the *ad medium* doctrine, because of this fact: *Kingman v. Sparrow* (1851), 12 Barb. 201; *Canal Commissioners v. People* (1830), 5 Wend. 424, 446. But in a very recent decision the United States Circuit Court, applying the law of the State of Michigan, held that the St. Mary's river, which

forms part of the international boundary and also part of a chain of waters included in the system of the Great Lakes, is subject to the English rule governing rivers there held to be non-navigable in law: *United States v. Chandler Dunbar Co.*, Wanty, J., 20th July, 1905, not reported.

After reading a great many American cases and text books, I find it impossible to discover any satisfactory explanation of the hopeless conflict of opinion which they exhibit. The reasons advanced for rejecting the English rule in States which repudiate it would seem to apply with quite as much cogency in States which have held it applicable.

Beyond vague statements that the *ad medium* rule is unsuited to the conditions of non-tidal navigable waters in Canada and should therefore be held not to be in force, I find no reason advanced in our cases (excepting *Dixon v. Snetsinger*, the *ratio decidendi* of which seems inapplicable to the western portion of this Province) to support the view propounded in the comparatively numerous dicta which I have quoted. While it is obvious that the *ad medium* rule would produce incongruities and almost absurdities, if applied to the great lakes, and might give rise to serious difficulties, if held applicable to rivers forming part of the international boundary, I must own that I see no incongruity and no difficulty likely to result from its application to our numerous inland rivers which are navigable in fact.

If the *ad medium* rule should be discarded merely on the ground of unsuitability, where should the line be drawn? Because unsuitable to some of our non-tidal navigable waters, should it be held inapplicable to all? Uniformity might be so attained, but would not that end be practically achieved by excepting from the application of the rule only the great lakes and the rivers connecting them and other rivers which form part of the international boundary?

How far does merely partial unsuitability warrant the exclusion from our system of jurisprudence of a portion, not of the English statutory law, but of the common law proper?

The Act of 1792, 32 Geo. III. ch. 1 (R.S.O. 1897, ch. 111), introduced "the laws of England" in the most comprehensive terms. It contained no restricting words, such as: "so far as applicable to conditions prevalent in Upper Canada," "so far as local circum-

Anglin, J.

1906

KEEWATIN  
POWER  
CO.

v.

TOWN OF  
KENORA.



Anglin, J.  
1906

KEEWATIN  
POWER  
Co.  
v.  
TOWN OF  
KENORA.

stances permit," "so far as such laws can be applied," or "as near as might be."

Upon such qualifying words the Courts have held that certain English statutes, not suitable to young colonies in new countries, were not brought into force by enactments introducing English law in terms otherwise general: *Attorney-General v. Stewart* (1817), 2 Mer. 143; *Whicker v. Hume* (1858), 7 H.L.C. 124, at p. 134; *Jex v. McKinney* (1888), 14 App. Cas. 77; *Yeap Cheah Neo v. Ong Cheng Neo* (1875), L.R. 6 P.C. 381; *Mayor of Lyons v. East India Co.* (1836), 1 Moo. P.C. 175. But, although the statute in question in the three cases first cited (the Mortmain Act) has been held to be in force in Ontario—*Doe Anderson v. Todd* (1846), 2 U.C.R. 82; *Corporation of Whitby v. Liscombe* (1875), 23 Gr. 1; *Macdonell v. Purcell* (1893), 23 S.C.R. 101, opinions have very much differed as to the sufficiency of the general language of the 32 Geo. III. ch. 1, to effect its introduction. In *Doe Anderson v. Todd*, Robinson, C.J., relies distinctly upon subsequent recognition by the Legislature of the fact that this statute was in force as the ground for holding that it is so, deeming the provisions of the statute of Geo. III. insufficient in themselves to effect its introduction. In *Corporation of Whitby v. Liscombe*, at p. 13, Draper, C.J., says: "It appears to me that these words are comprehensive enough to include the Act 9 Geo. II. ch. 36." Patterson, Burton, and Moss, J.J.A., rest their judgments on the doctrine of *stare decisis*, many decisions having, during the intervening 31 years, been based upon *Doe Anderson v. Todd*; but Moss, J.A., at p. 36, says: "If the only question was whether *Doe Anderson v. Todd* was well decided I should hesitate long before holding in the affirmative." In *Macdonell v. Purcell* (p. 114) the judgment rests upon the *stare decisis* doctrine. See, too, *Shea v. Choat* (1846), 2 U.C.R. 211, 221. But statute law and common law existing independently of statute are widely different subjects: *Uniacke v. Dickson* (1848), 2 N.S.L.R. (James) 287, 289, 290; and I find no case in which it has been held that a general and unrestricted introduction of English law into ceded territory does not bring into force the entire common law proper, as distinguished from English statutory law. There are, however, several dicta of learned Judges to the effect that the introduction of the common law proper into Upper Canada is subject to the same qualification

which has been implied in regard to the statute law, namely, that provisions of the English law not applicable to the state and condition of the Province were not imported. In *Doe Anderson v. Todd*, Robinson, C.J., says (p. 86), that the words of our statute of 1792 do not place the introduction of English laws into this Province on a footing materially different, as regards the extent of the introduction, from that on which those laws stand in a colony first settled by British subjects. McLean, J., says that the effect of the Act of 1792 was to make the laws of England the governing rule only "in all matters in which they can properly and reasonably be brought into operation here." Moss, J., in *Corporation of Whitby v. Liscombe* (p. 37), takes a similar view. In *Attorney-General v. Stewart*, 2 Mer. 143, at p. 159, Sir Wm. Grant, M.R., says: "What Mr. Justice Blackstone says in his Commentaries, with respect to newly settled colonies, is in a great degree applicable to any colony to which the laws of England may be extended."

In several of our cases dealing with the doctrine now being specially considered, eminent Judges have expressed similar views: Richards, J., in *Gage v. Bates*, 7 C.P., at p. 129; Gwynne, J., in *Dixon v. Snetsinger*, 23 C.P., at p. 245.

Finally, in *Re Provincial Fisheries*, 26 S.C.R., at p. 528, Strong, C.J., says: "It is said that the common law of England applies to new settled colonies only so far as it is adapted to the circumstances and requirements of the colonists. I cannot bring myself to think, this being the condition on which the law of England applies in settled colonies, that we are required, in the case of ceded colonies which have adopted that law as the rule of decision, to apply it in a manner which would be entirely unsuitable to the circumstances and conditions of the people."

Though it be fairly well established that such portions of the English common law proper as were not reasonably applicable to the conditions of this Province were not introduced in 1792, yet the application of the criteria of "suitability" and "reasonableness" must, except in the clearest cases, always give rise to difficulty and not infrequently to divergence of opinion: see *Doe Anderson v. Todd*, 2 U.C.R. at p. 87, per Robinson, C.J. Assuming that doctrines of the English common law wholly unsuited to our conditions should be altogether rejected and other doctrines of the same law applied only so far as they appear to be reasonably adapted to those

Anglin, J.

1906

KEEWATIN  
POWER  
Co.  
v.TOWN OF  
KENORA.

Anglin, J.  
1906  
KEEWATIN  
POWER  
Co.  
v.  
TOWN OF  
KENORA.

conditions, in determining to what non-tidal navigable waters in Ontario the English *ad medium* rule is not reasonably applicable, our Courts would encounter many difficult problems for the solution of which it would seem scarcely possible to prescribe an immutable standard.

That the rights of riparian proprietors may be as little uncertain as possible, it will be better, if a logical basis can be found for that conclusion, that it should be held that the *ad medium* rule does not apply to any waters in this Province which are navigable in fact, rather than that the rule applies to such bodies of navigable water as the Courts may from time to time deem fit subjects for its application. I think such a basis exists.

It is conceded that the public right of way upon our non-tidal waters, which are navigable in fact, has always existed *ex jure naturæ*. That right in these waters is precisely the same as the like right in tidal navigable waters. If the presumption, which ascribes to the Crown the title in the soil under English waters navigable in law, rests upon the tidal character of such waters, the fact that the right of navigation upon our waters exists *jure naturæ* is not of importance; but, if that presumption arises from the existence *jure naturæ* of the public right of navigation in English tidal waters, then the like right in our non-tidal navigable waters should carry with it the same presumption.

Upon an examination of the English cases the navigability and not the tidal character of tidal navigable waters appears to be the real foundation of the presumption that the ownership of the soil is vested in the Crown.

Although the flux and reflux of the tide affords *prima facie* evidence of navigability, its strength depends upon the situation and nature of the channel: *Rex v. Montague* (1825), 4 B. & C. 598, 602; *Miles v. Rose* (1814), 5 Taunt. 705; *Mayor of Lynn v. Turner* (1774), Cowp. 86. In these and other cases it has been held that many incidents of navigable tidal waters do not extend to non-navigable waters subject to the influence of the sea tides.

Woolrych, in his valuable treatise on the Law of Waters, 2nd ed., at p. 42, says: "The circumstance, therefore, of the flow and reflow of the tide is one of the strongest in support of a public right, but so far from being conclusive, we have mentioned a case in which such a test has been found to be fallible. Public user for the pur-

poses of commerce is consequently the most convincing evidence of the existence of a navigable river and, *that fact being established*, the accompanying rights of fishery, and of ownership of soil, etc., are easily defined."

In *Illinois Central R.W. Co. v. State of Illinois* (1892), 146 U.S.R. 387, Mr. Justice Field, in delivering the opinion of the Supreme Court of the United States, says at p. 436: "So also, by the common law, the doctrine of the dominion over and ownership by the Crown of lands within the realm under tide waters is not founded upon the existence of the tide over the lands, but upon the fact that the waters are navigable, tide waters and navigable waters, as already said, being used as synonymous terms in England. The public being interested in the use of such waters, the possession by private individuals of lands under them could not be permitted except by license of the Crown, which could alone exercise such dominion over the waters as would insure freedom in their use so far as consistent with the public interest. The doctrine is founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment, a reason as applicable to navigable fresh waters as to waters moved by the tide. We hold, therefore, that the same doctrine as to the dominion and sovereignty over and ownership of lands under the navigable waters of the Great Lakes applies, which obtains at the common law as to the dominion and sovereignty over and ownership of lands under tide waters on the borders of the sea, and that the lands are held by the same right in the one case as in the other, and subject to the same trusts and limitations."

In the dissenting opinion of the minority, Shiras, Brown and Gray, JJ., at p. 474, I find this sentence:—

"The able and interesting statement, in the opinion of the majority, of the rights of the public in navigable waters, and of the limitation of the powers of the State to part with its control over them, is not dissented from."

In *Gann v. Free Fishers of Whitstable* (1864), 11 H.L. 192, and in many other cases, it is recognized that the ownership by the Crown of the bed of rivers navigable in law, though in one sense a *jus privatum*, is for the benefit of the subject and for the protection of the public rights of navigation.

A consideration of the decisions upholding the title of the Crown

Anglin, J.

1906

KEEWATIN  
POWER  
Co.  
v.

TOWN OF  
KENORA.



Anglin, J.  
1906  
KEEWATIN  
POWER  
Co.  
v.  
TOWN OF  
KENORA.

to the bed of tidal waters has satisfied me that the necessity of fully protecting the public rights of navigation and fishery in the superjacent waters was the dominant, if not the sole, factor in building up the English common law doctrine that the beds of navigable tidal waters are presumed to be vested in the Crown.

The facts that the presumption of navigability was restricted to tidal waters and that the importance of the public rights in non-tidal navigable rivers was not recognized when title to the lands upon their banks was acquired, account for acquiescence in the claim to title to the alveus made by riparian owners upon the latter class of rivers. That claim, conceded in early days, precluded the application in England to these waters of the presumption in favour of Crown ownership of the alveus, which obtained in regard to tidal waters, because when the public right of navigation in non-tidal rivers was asserted, private rights in the soil of the bed had long since become vested. In this country the public right of navigation in all navigable waters has always existed and been recognized. To give the fullest effect to all the incidents which, in the absence of obstacles, that right should carry with it, interferes here with no vested interests. The title to both bed and banks being in the Crown, its grant of the latter may be construed according to the rules which govern the construction of grants made under similar conditions in England. There the nature of the tenure upon which the Crown holds title to the alveus of rivers navigable in law precludes any presumption of an intention to part with any portion of it, unless such portion is granted in express terms. Since in all waters of this country, which are navigable in fact, the interest of the Crown in the bed is precisely the same as that which it possesses in the *fundus* of tidal navigable waters in England, it is a logical deduction that by nothing short of an express grant should the Crown be held to have parted with its title to the alveus of our navigable rivers.

Indeed, it may not unfairly be said that even in England the application of the *ad medium* rule is restricted to rivers in which the alveus had already become the property of private riparian owners before the public right of navigation in such rivers was established. We have no rivers of the latter class in this country.

When the *raison d'être* of the English *ad medium* rule as applied to non-tidal navigable rivers is understood, and the peculiar con-

ditions under which it became established in England are appreciated, English authorities no longer present formidable obstacles to the acceptance of the proposition enunciated in the many strong expressions of opinion by our own Judges which I have quoted. In our rivers which are navigable in fact, because the public rights in them are recognized to have always existed, *ex jure nature*, the title to the alveus must be presumed to remain in the Crown unless expressly granted. It follows that a Crown grant of lands bordering upon such rivers gives title to the grantee only to the water's edge.

But it is argued that in any event the *ad medium* rule should apply to such parts of navigable rivers as are in their natural state non-navigable owing to impediments such as falls or rapids. Such is not my opinion. Once the navigable character of the river is established, up to the point at which navigability entirely ceases the stream must be deemed a public highway, though above that point it is private property: *The Queen v. Robertson*, 6 S.C.R. 52.

The inconvenience which would ensue were the soil of the bed of the same river in alternate stretches vested in the Crown, *juris publici*, and in the riparian owners, *juris privati*, affords strong ground for the belief that the law is not in a condition which would produce such results. Then again, though navigation at the falls in the east branch of the Winnipeg river is presently impossible, the engineers say that a canal to overcome the natural obstacle which the falls present is quite possible. Is not the stream even at this point navigable *in posse*? I think it is.

There is judicial authority for the proposition that a natural interruption of navigation in a river, in its general character navigable, does not change its legal characteristics in that respect at the point of interruption, and that riparian owners are not at such point presumed to own the bed *ad medium filum*: *Re State Reservation at Niagara Falls* (1884), 16 Abbott's N. C. (N.Y.) 159, 187; 37 Hun 507, 547-8. I do not overlook the fact that the river under consideration in this case was international. See, too, *Broadnax v. Baker* (1886), 94 N.C. 675, 681; Farnham on Waters, p. 102. See, too, *Hurdman v. Thompson* (1895), 4 Que. R. (Q.B.) 409, 437, 450.

Gwynne, J., in *McLaren v. Caldwell*, 8 S.C.R. 435, at pp. 465-6, expressed *obiter* the contrary view, basing it upon the judgment of Sir James Macaulay in *Regina v. Meyers*, 3 C.P. 305. But on

Anglin, J.

1906

KEEWATIN

POWER

Co.

v.

TOWN OF

KENORA.

Anglin, J.  
1906  
KEEWATIN  
POWER  
Co.  
v.  
TOWN OF  
KENORA.

examination Sir James Macaulay's judgment hardly seems to warrant its citation as authority for the proposition of Mr. Justice Gwynne: see p. 352. The judgment of the Supreme Court in *McLaren v. Caldwell* was reversed in the Privy Council, 9 App. Cas. 392, but this point is not touched upon in the judgment of the Judicial Committee.

As part of an important stretch of navigable waters the east branch of the Winnipeg river is, in my opinion, at the falls as well as above and below them, subject to the incidents of navigable waters.

Apart, therefore, from any special terms which they contain, the grants to the plaintiffs do not sustain their claim to the ownership of the bed of the portion of the east branch of the Winnipeg river which flows between their respective properties.

But Mr. Rowell argues that certain reservations in the Hudson's Bay Company's grant and other special provisions in the Keewatin Power Company's grant also require this construction.

The former grant contains these words:—

"Saving, excepting and reserving nevertheless, unto us, our heirs and successors, the free uses, passage and enjoyment of, in, over and upon all navigable waters that shall or may be hereafter found on or under, or be flowing through or upon any part of the said parcel or tract of land hereby granted as aforesaid, reserving also right of access to the shores of all rivers, streams and lakes for all vessels, boats and persons, together with the right to use so much of the banks thereof, not exceeding one chain in depth from the water's edge, as may be necessary for fishery purposes."

The reservation of rights of navigation is merely an expression of what would be presumed were there an express grant of the alveus itself. It is quite consistent with the patent conveying to the grantee title to the bed of the river *ad medium*. The reservation of the right of access to the shores is in my opinion merely incidental to the right of navigation and also consistent with the grant carrying title to the bed *ad medium*: see *Hawkins v. Mahaffy* (1881), 29 Gr. 326.

But the reservation of the right to use a strip along the bank one chain in depth from the water's edge for fishery purposes is not so easily disposed of. This also is merely an easement, yet it implies that the right of fishery does not pass to the grantee, as it

would if the stream were strictly private and the grant carried title to the soil *ad medium*. The right of fishery is a *profit a prendre* appertaining to the ownership of the alveus: *Re Provincial Fisheries*, 26 S.C.R. 444; *Robertson v. The Queen*, 6 S.C.R. 52. If, then, the grant carried title to the bed of the stream *ad medium*, the right of fishery passing with it, this reservation would be meaningless. Does its presence indicate that it was intended that title to the soil of the bed should remain in the Crown, or merely that the grantee should not have as a property right, incident to his ownership of the soil, an exclusive right of fishery? In *Hindson v. Ashby*, [1896] 2 Ch. 1, at p. 10, Lindley, L.J., says: "It must be taken as now settled that, if the right to a several fishery in a public navigable river is proved to exist, the owner of the fishery is to be presumed to be also the owner of the soil over which his fishery extends, unless there is evidence to the contrary:" *Holford v. v. Bailey* (1846), 8 Q.B. 1000, 1016; (1851) 13 Q.B. 426. The presumption would seem to be *a fortiori* in a private river. If, then, the language of the Hudson's Bay Company's patent implies a reservation of a right of fishing to the Crown for the public, the argument that the soil of the bed of the stream was not intended to pass to the grantee seems cogent. But the view I have taken of the main question renders it unnecessary to determine the nature and effect of this reservation.

In the case of the Keewatin Power Company, however, we find reservations of a very different character. That instrument is, the defendants urge, only consistent with the grantees' title terminating at the water's edge. The letters patent granting Tunnel Island also grant to the Keewatin Power Company in express terms two smaller islands lying in the west branch of the Winnipeg river, between Tunnel Island and the mainland, a block of land on the south shore of the west branch of the river, and all the islets or reefs of rocks and the land under the water in the west branch of the Winnipeg river between Tunnel Island and the block of land upon the south shore granted to the company, "together with the water power adjoining thereto on the west branch or outlet of the said Winnipeg river, the whole herein described land containing three hundred and eighty-six acres and a half more or less." This grant is "subject to the condition and understanding that nothing herein contained shall be constructed as conferring upon the grantees

Anglin, J.

1906

KEEWATIN  
POWER  
Co.  
v.TOWN OF  
KENORA.



Anglin, J.  
1906  
—  
KEEWATIN  
POWER  
CO.  
v.  
TOWN OF  
KENORA.

exclusive rights elsewhere upon the said Lake of the Woods or upon any other streams flowing into or out of the said lake, or shall confer upon the said company power or authority to interfere with or in any way restrict any powers or privileges heretofore enjoyed by us or which may hereafter be granted or demised to any other person or company in respect of any other water power on the said Lake of the Woods or any other stream flowing out of or into the said lake. Provided that any such powers or privileges which may hereafter be granted shall not destroy or derogate from the privileges hereby granted.”

The grant of the islets and reefs of rocks and land under water, situate between Tunnel Island and the block of land upon the south shore granted to the company, imports that the grant of the two latter parcels did not carry title to the bed of the river, because, if it did, these rocks or islets and the land under water would by virtue of that title become the property of the grantees, and this express grant of them was wholly unnecessary. If the title to the bed of the west branch did not pass, except by this express grant, neither did the title to the bed of the east branch *ad medium*, of which there is no such express grant. The express grant of the water power on the west branch reinforces this argument. The interpretative words, “that nothing herein contained shall be construed as conferring upon the grantees exclusive rights elsewhere upon the said Lake of the Woods, or upon any other streams flowing into or out of the said lake,” render it in my opinion impossible to successfully contend that this grant was intended to give to the Keewatin Power Company ownership of the western half of the bed of the east branch of the Winnipeg river—another stream flowing out of the Lake of the Woods—which would carry with it the “exclusive rights” which these plaintiffs now assert: *Lord v. Commissioners of Sydney*, 12 Moo. P.C. 473, 497, 498; *Hare v. Horton* (1833) 5 B. & Ad. 715; Farnham on Waters, p. 240. The reservation of the right to demise powers and privileges in respect to other water powers and other streams flowing out of the lake if possible renders this conclusion still more certain. Upon this ground, as well as upon the non-applicability of the *ad medium* rule to these waters, I am clearly of opinion that the claim of the Keewatin Power Company to the soil of the western half of the bed of the east branch of the Winnipeg river wholly fails.

What then are the rights of the plaintiffs as riparian owners not entitled to the soil of the bed of the stream? There can be no doubt that, subject to any restrictions in the grants under which they take title, riparian owners are entitled to a most extensive usufruct, extraordinary as well as ordinary, of the waters flowing past their lands.

In *Miner v. Gilmour* (1858), 12 Moo. P.C. 131, Lord Kingsdown, delivering the judgment of the Judicial Committee, says at p. 156:—

“By the general law applicable to running streams, every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land; for instance, to the reasonable use of the water for his domestic purposes and for his cattle, and this without regard to the effect which such use may have, in case of a deficiency, upon proprietors lower down the stream. But, further, he has a right to the use of it for any purpose, or what may be deemed the extraordinary use of it, provided that he does not thereby interfere with the rights of other proprietors, either above or below him.”

In *North Shore R.W. Co. v. Pion* (1889), 14 App. Cas. 612, Lord Selborne, after quoting the above passage as undoubted law, says, at p. 620:—

“The question whether this general law was, in England, applicable to navigable and tidal rivers, arose, and (with the qualification only that the public right of navigation must not be obstructed or interfered with) was decided in the affirmative by the House of Lords, in *Lyon v. Fishmongers' Co.* (1876), 1 App. Cas. 662 at p. 683. That decision was arrived at, not upon English authorities only, but on grounds of reason and principle, which (if sound, as their Lordships think them) must be applicable to every country in which the same general law of riparian rights prevails, unless excluded by some positive rule or binding authority of the *lex loci*.” See, too, *Hamelin v. Bannerman*, [1895] A.C. 237, 240.

Where the banks on either side are vested in the same person, only the rights of owners above and below need be considered in using the waters. But where the banks on either side belong to different persons, the soil of the alveus being not the common property of both, but belonging to each in severalty *usque ad medium filum*, neither proprietor is entitled to use it in such a manner as

Anglin, J.

1906

KEEWATIN  
POWER  
Co.  
v.

TOWN OF  
KENORA.

Anglin, J.  
1906

KEEWATIN  
POWER  
Co.  
v.  
TOWN OF  
KENORA.

to interfere with the natural flow of the stream past the property of the other.

In *Bickett v. Morris* (1866), L.R. 1 Sc. App. 47, these restrictions upon the rights of riparian owners are pointed out, and it is held that "any operation extending into the stream is an interference with the common interest of the opposite riparian proprietor, and, therefore, the act being *primâ facie* an encroachment, the onus seems properly to be cast upon the party doing it to shew that it is not an injurious obstruction": p. 56; see, too, pp. 59 and 61; *Orr Ewing v. Colquhoun* (1877), 2 App. Cas. 839, at p. 845, 861; *Kirchoffer v. Stanberry*, 25 Gr. 413, 420.

Where the riparian proprietor is not the owner of the part of the alveus adjacent to his land, he has no right to place any erection upon it or to interfere in any way with the bed of the stream. His right to the usufruct of the water is restricted by the limitations that he may not place any erection in the alveus and may not, except for ordinary purposes, employ the water in any manner which interferes with the rights of adjacent proprietors opposite as well as above and below him on the stream. These riparian rights are of course subject to the public right of navigation and to the right of fishery incident to the ownership of the alveus.

Thus limited this right of usufruct the Hudson's Bay Company, as riparian proprietors, enjoy in the waters of the east branch of the Winnipeg river. So far as this incidental right enhances the value of the property which the defendants propose to take from these plaintiffs, the latter are entitled to be allowed compensation for it in the pending arbitration.

Prospective capabilities of the property of the plaintiffs, having regard to the extent of their rights as riparian owners, must be taken into consideration, as they may form an important element in determining the real value of the lands: *Lefebvre v. The Queen* (1884), 1 Ex. C.R. 121.

If both plaintiffs were entitled to these riparian rights, it may be that they would be justified in asking the arbitrators to treat them as a single proprietor and allow to both jointly the amount by which the value of the lands on both sides of the stream would be enhanced by the usufruct of the water, if such lands were held by a single owner, such usufruct being in that case restricted only

by inability to utilize or interfere with the alveus and the riparian rights in the waters of proprietors above and below.

But in my opinion the riparian rights of the Keewatin Power Company are less extensive than those of the Hudson's Bay Company. The grant to the Keewatin Power Company is subject to the "express condition and understanding" that nothing contained in it shall confer "upon the grantees exclusive rights elsewhere upon the said Lake of the Woods, or upon any other streams flowing into or out of said lake, or shall confer upon said company power or authority to interfere with or in any way restrict any powers or privileges heretofore enjoyed by us or which may hereafter be granted or demised to any other person or company in respect to any other stream flowing out of or into the said lake."

The company are by this patent given certain exclusive rights and water power privileges on the west branch of the Winnipeg river. The east branch of the Winnipeg river is another—the only other—stream flowing out of that lake. Upon this stream the Crown reserves the right to grant or demise water power privileges in nowise restricted. It by implication, if not expressly, withholds from the Keewatin Power Company any rights, riparian or other, which would in any way hamper or interfere with the fullest enjoyment of any rights which it should thereafter grant or demise, and of such rights as it has now in fact demised to the defendants in respect to the water power in question. It follows, I think, that the Keewatin Power Company are entitled only to such usufruct of the waters of the east branch flowing past Tunnel Island as they may have subject to the limitations already indicated in the case of the Hudson's Bay Company, and also to the further restriction that this usufruct shall in nowise diminish or hamper the powers and privileges of the defendants under their Crown lease and statutory franchise. So far as their riparian interest in these waters thus limited may enhance the value present and prospective of the lands of which the defendants propose to deprive these plaintiffs, but no farther, it should be taken into account by the arbitrators in determining the compensation to which they may be entitled.

I am also asked by Mr. Nesbitt in the case of the Keewatin Power Company to declare this company entitled to claim compensation from the defendants in the pending arbitration for any injury, present or prospective, which the carrying out of the projected

Anglin, J.

1906

KEEWATIN  
POWER  
Co.  
TOWN OF  
KENORA.



Anglin, J  
1906  
KEEWATIN  
POWER  
CO.  
v.  
TOWN OF  
KENORA.

works of the defendants in the east branch may work to the dam of these plaintiffs in the west branch or to their water power rights or privileges in that watercourse. The grant to the Keewatin Power Company contains this further proviso: "Provided that any such powers or privileges which may hereafter be granted shall not destroy or derogate from the privileges hereby granted." It may be that this proviso will enable these plaintiffs to restrain the defendants from so carrying out their projected works as to interfere with the company's rights and privileges in the west branch, or it may entitle the Keewatin Power Company to claim compensation in damages for any injury which they may sustain by such interference. But that is not a proper question in my opinion for consideration upon the present arbitration. There is no evidence before me to warrant a belief that the defendants' works, if carried out as projected, will in any way affect the rights and privileges of these plaintiffs in the west branch. That question must be left open and nothing done or omitted in the present litigation will in anywise prejudice them, if, at any future time, the Keewatin Power Company seek to prevent or to obtain redress for such injuries. I must, however, decline to now pronounce a declaratory judgment upon this phase of the case presented by these plaintiffs.

It was a term of the settlement, during the trial, of certain questions at issue between the parties that I should dispose of the costs incurred in respect of those matters as well as the general costs of these actions. Having regard to the nature of the issues, and to the disposition made of the entire case, my discretion as to costs will, I think, be most properly exercised by requiring the respective plaintiffs to pay to the defendants three-fourths of their costs of defending these actions, other than costs incurred upon and as incidental to the motion or motions for injunction, as to which there will be no order.

G. F. H

## [DIVISIONAL COURT.]

RE CRICHTON.

D. C.

1906

Dec. 15.

*Medical Practitioner—"Infamous and Disgraceful Conduct in a Professional Respect"—Medical Council—R.S.O. 1897, ch. 176—Erasure of Name from Register—Advertising Secret Remedy—Charge Merely Advertising, while Finding Deceitful and Fraudulent Advertising—Mistrial—Appeal to Divisional Court—Setting aside Finding.*

A charge was laid before the Medical Council under Sec. 33 of the Ontario Medical Act R.S.O. 1897, ch. 176, against a medical practitioner, that he was guilty of "infamous and disgraceful conduct in a professional respect," in advertising a secret remedy called "grippura," which the advertisement claimed would cure grippe or influenza, and would assist in curing a number of other diseases, while the finding against him was, that he was guilty of deceitful and fraudulent advertising, for which his name was ordered to be struck off the register:—

*Held*, on appeal to Divisional Court, under sec. 36 of the Act, that the order could not be supported, and must be set aside; and his name, if struck off, restored to the register.

What constitutes "infamous or disgraceful conduct in a professional respect," considered and commented on, as well as the evidence submitted with reference thereto, and the course pursued by the prosecution on the hearing of the charge.

THIS was a motion by way of appeal to a Divisional Court, under sec. 36 of the Ontario Medical Act, R.S.O. 1897, ch. 176, from the decision of the council of the Medical College of Physicians and Surgeons for Ontario, directing the erasure of the name of Alexander Crichton, the appellant, from the register of the college.

The appeal was founded, as provided by sec. 36, upon a copy of the proceedings before the Discipline Committee of the council appointed under sec. 35, the evidence taken before such committee, the committee's report to the council, and the order of the council thereon.

The notice directing the inquiry before the committee stated that a meeting would be held of the committee appointed by the College of Physicians and Surgeons of Ontario, in order to cause inquiry to be made to ascertain the facts in the case of Alexander Crichton, a registered medical practitioner, alleged to have been guilty of infamous and disgraceful conduct in a professional respect, whereby the said Alexander Crichton was alleged to be liable to have his name erased from the register of the said college, under the provisions of the said Act; and that the subject matter of the said inquiry to be entered into by the said committee at the time

D. C.  
1906  
RE  
CRICHTON.

and place aforesaid was whether the said Alexander Crichton had been guilty of infamous or disgraceful conduct in a professional respect, whereby he was liable to have his name erased from the said register; and that before the said committee, at the time and place aforesaid, the following, among other charges, might be made: "That he, Alexander Crichton, did, in the years A.D. 1902, A.D. 1903, and A.D. 1904, cause to be printed and issued to the public and to the drug trade certain *circulars and advertisements* as to the efficacy of 'Grippura' as a cure for grippe and influenza; and that the said Alexander Crichton, in so causing the said circulars to be printed and issued, so advertising the efficacy of 'Grippura,' was guilty of infamous and disgraceful conduct in a professional respect, whereby the said Alexander Crichton is alleged to be liable to have his name erased from the register of the said college, under the provisions of the said Act."

In pursuance of the notice, the committee, composed of Doctors L. A. Bray (chairman), F. W. Campbell, W. Spankle, J. A. Robertson, and R. A. Pyne (registrar), met at Cobourg on the 10th of February, 1905.

*J. W. Curry*, K.C., appeared as counsel for the Discipline Committee.

*W. F. Kerr*, as counsel for Dr. Crichton.

Mr. Kerr stated that he had written Mr. Curry requesting him to particularize the special features complained of in Dr. Crichton's circular or circulars, but that he had received no reply thereto; that he now wished to have pointed out to him the parts of the circular or circulars which are alleged to be infamous or disgraceful in a professional respect.

Mr. Curry stated that the evidence was contained within the four walls of the circular, and in the publication and issue of the same.

Mr. Kerr submitted that Mr. Curry should mention such particular points, in order that he might direct his cross-examination thereto; that it was a very difficult matter to meet a charge unless the charge was made known, as it meant the calling of innumerable witnesses at great expense.

Mr. Curry answered that he had already told Mr. Kerr that the charges were within the four walls of the circular.

The evidence was then gone into, the substance of which appears in the judgments.

On the 28th of June, 1905, a written notice was served on the appellant's solicitors, notifying them that they were not prepared to report in reference to the appellant's case, and that the appellant need not attend the meeting of the council.

On the 5th of July, 1905, the committee reported to the council that the said Alexander Crichton had been duly notified to attend before the committee, and his attendance before them, and that evidence had been taken in the matter, but that they had not been able to come to a conclusion; and they begged leave to report such failure, and asked leave to further consider the evidence and exhibits, and the case generally.

The committee were authorized by the council to further consider the matter; and they thereupon, on the 19th of April, 1906, served the said Alexander Crichton with a notice requiring his attendance before them at Cobourg on the 7th of May.

In this notice the charge was as follows: "In that he, the said Alexander Crichton, did infamously, disgracefully, improperly, and unprofessionally advertise and distribute advertising circulars claiming to have discovered a remedy which would cure la grippe or influenza in a few hours, and assist in curing a number of other diseases, and did, through said advertising circulars, solicit and request that all letters of inquiry in reference to said remedy be sent to him, the said Alexander Crichton, at Castleton, Ontario; and that said advertising pamphlets did appear and were distributed to some residents of the county of Northumberland and throughout the Province of Ontario."

The committee, in pursuance of this notice, met at Cobourg on the 7th of May, when *R. W. Eyre* appeared as counsel for the Discipline Committee, and *W. F. Kerr* for Dr. Crichton.

Mr. Kerr asked if it was a continuation of the former inquiry, when he was informed that it was. He then contended that he was entitled to put in as part of the case the proceedings of the medical council with relation to the report made by the committee on July 5th, 1905.

D. C.

1906

RE

CRICHTON.



D. C.  
1906  
RE  
CRICHTON.

This was objected to, and refused. Mr. Kerr, also, on behalf of the appellant, demanded that he be furnished with a copy of the evidence taken at the former sittings, which he offered to pay for, but this was refused.

Further evidence was taken, including an analysis of the medicine, which is sufficiently referred to in the judgments, and the committee adjourned.

On July 3rd, 1906, a written notice was served on the appellant to attend a meeting of the council to be held on July 6th, and that if he desired it, he might be represented by counsel.

On the said date the council met, there being some 27 or 28 members present.

*J. W. Curry*, K.C., appeared for the Discipline Committee.

*W. F. Kerr* appeared for the appellant, who was also present.

The committee then handed in their report, which, after referring to the two sittings of the committee, and stating that the evidence taken at such sittings accompanied their report, stated:

"1. As to the charge which alleges that the said Alexander Crichton has been guilty of infamous and disgraceful conduct in a professional respect, the particulars of which are as follows—that is to say: that the said Alexander Crichton did infamously, disgracefully, improperly, and unprofessionally advertise and distribute advertising circulars claiming to have discovered a remedy which would cure la grippe or influenza in a few hours, and assist in curing a number of other diseases specifically mentioned in said circular; solicit and request that all letters of inquiry in reference to said remedy be sent to him, the said Alexander Crichton, at Castleton, Ontario; and that the said advertising pamphlets did appear and were distributed to some of the residents of the county of Northumberland, throughout the Province of Ontario.

Your committee finds this charge proved, and that the said Alexander Crichton endeavoured to impose upon the credulity of the public, for the purpose of gain, by attempting to deceive the said persons as might read the said advertisements."

The evidence was not read over to the council, but each of the members was furnished with a copy of the evidence.

When the council were about to consider their finding, Dr. Crichton was asked to retire, but before doing so he made the

following statement: "It has been admitted at a previous trial that the High Court expects every man to have read this evidence before he comes to his decision."

On his return, a resolution was presented to erase his name from the register, whereupon Dr. Adams, one of the members of the council, enquired, "May I ask if there is anything in the statement that the accused made before he left the room, that no man is allowed or should give his vote unless he had the evidence in both trials? I, for one, have not had the opportunity."

To this the President replied: "I think the registrar caused Mr. Rose to place a copy of the evidence before every member seated."

Mr. Curry, also, said: "Any man, if he is satisfied with the finding of the committee, has a perfect right to vote. There is no onus on him to read over any more evidence than he wants to."

The resolution was then put to the meeting, and adopted, and an order made directing the appellant's name to be erased from the register.

This appeal was then made and on December 3, 4, 5, 1906, was heard before a Divisional Court, composed of BOYD, C., MAGEE, and MABEE, JJ.

*W. F. Kerr*, for the appellant.

*J. W. Curry*, K.C., for the Discipline Committee.

*H. S. Osler*, K.C., for the council.

The arguments and authorities referred to sufficiently appear from the judgments.

December 15, 1906. BOYD, C.:—This lengthened inquiry has resulted in a mis-trial. To manifest this it is necessary to consider the proceedings briefly.

The charge, as originally launched on January 24th, 1905, was that A. Crichton did in the years 1902-3-4 cause to be issued to the public and the drug trade circulars and advertisements as to the efficacy of "Grippura" as a cure for grippe and influenza, and in so advertising was guilty of infamous and disgraceful conduct in a professional respect.

D. C.  
1906  
RE  
CRICHTON.

D.C.  
1906  
RE  
CRICHTON.  
Boyd, C.

There was no publication in the newspapers, but the objectionable circular was sent by mail to various persons—"intelligent persons," says the accused—selected from names in the directory and Bradstreet. The circular is in the form of a broad sheet (22 x 14 in. in size), except that it is printed on both sides, and contains a miscellaneous jumble of testimonials, references to different diseases, commendation of "Grippura," information about the doctor himself and his discovery, and quotations as "to many important discoveries being fearfully hindered and opposed at the start."

At the opening of the investigation particulars of the charge were sought, but this was refused by the prosecution, on the ground that all might be found in the circular.

The doctor was then questioned at large, under oath, as to all the circulars, including that of 1905. Substantially they are the same; and as to all that is stated therein respecting his secret remedy, "Grippura," and its power to cure certain ailments and alleviate certain others, he affirms their truth or his belief in their truth. The testimonials printed from persons benefitted are all genuine, and generally it was spoken of by the witnesses for the prosecution thus: "There was nothing in the wording of the circular offensive or of objectionable character": Dr. Field. "It is not the contents of it I am objecting to; the claims he makes are entirely objectionable": Dr. Henderson.

The accused declined to disclose the ingredients of his preparation, but offered to submit it to be practically tested in the hospital, and to have it "sifted to the bottom" (as he expressed it).

It was also proved that the accused was a graduate in arts in the University of Toronto and silver medalist in classics; that he had studied and completed his course in medicine in the Toronto School, and had been in practice since 1892. Four physicians were examined for the prosecution, and their evidence, in the main, agrees that the conduct of the accused, in keeping his remedy a secret and in advertising its benefits publicly, was disgraceful and infamous, in a professional point of view, under the statute, and this even if the remedy was a good one. But they all discredit the truth of what is claimed, and, though they have not tried the mixture and have not any practical knowledge of it, they give expert opinion in contravention of the testimonials and of the

statements of the accused and others examined. The underlying belief in the mind of these professional witnesses may be thus expressed: The fact of the formula being kept a secret indicates fraud; the fact of advertising the nostrum indicates quackery.

Dr. Ferris explains his point of view in this way: "If he is right, the circular might not prove to be misleading, but at the present time it would be. . . . It should be subject to test at the hospital, and, if he is right, the circular is not misleading."

Dr. Douglas (who was formerly a partner of the accused) says "I believe the object is to deceive the public."

Dr. Ferris thinks it "not intentionally misleading."

Dr. Douglas proceeds: "This conduct is little better than a quack," who, he explains, is "a man who advertises to the public that he can do a certain thing, and gets money out of them, when what he advertised is no good." And, again, "It is misleading to the public because I don't think he can accomplish what he claims."

He places no value on the lay testimonials, and says medical people are best able to judge, and he agrees with Dr. Ferris that it would be a fair test to submit the preparation to be applied in a hospital.

Dr. Henderson says: "The claims he makes are objectionable, unless they were proven to be true;" and, further, that the accused's own experience and the testimony of laymen are not proper tests or proofs.

The accused then put in a Presbyterian and a Methodist clergyman and an old resident of Castleton (where the accused practised), who proved that he had a good reputation for honesty, integrity, and truthfulness. These witnesses also spoke generally of the benefits they and their families had derived from the use of "Grippura."

Upon these materials the committee of inquiry reported on the 5th of July, 1905, that they had failed to arrive at a conclusion, and asked leave to consider further the evidence, exhibits, and the case generally.

In submitting this report, the chairman said that "All agreed that it was disgraceful conduct, and came under the statute . . . That, although from all the facts the advertisements and statements were such as were very misleading to the public, and had the effect of taking money out of the people's pockets, yet the

D. C.

1906

RE

CRICHTON

Boyd, C.



D. C.  
1906  
RE  
CRICHTON.  
Boyd, C.

council had never recommended that any man should be struck off for advertising alone. There has always been something more in connection with it. . . . He did not feel that the case was sufficiently strong to bring in a verdict against him. . . . It is a very difficult case. . . . He firmly believes he is doing what is right. He thinks he is sure to help poor suffering humanity for consideration. If the consideration was not there, I don't think he would do it. . . . We do not want to report a man where the evidence is, in our minds, not quite strong enough. . . . If counsel says this evidence is not sufficient, we will try to get some more."

It was then referred back to the committee to take further proceedings, if the accused did not stop advertising.

The second notice of proceedings to erase the name was served on the 27th of April, 1906, alleging that the appellant had been guilty of infamous and disgraceful conduct in a professional respect, and giving, in the notice, as particulars these: That he did infamously, improperly, and unprofessionally advertise and distribute advertising circulars claiming to have discovered a remedy which would cure la grippe or influenza in a few hours (and assist in curing a number of other diseases), and did solicit and request that all letters of inquiry in reference to the remedy should be sent to him, etc.; and that said advertising pamphlets were distributed to some of the residents of the county of Ontario and throughout the Province.

In answer to a letter from the appellant's solicitor, asking for full particulars as to wherein the advertisement or circular was infamous or disgraceful, the solicitor made response referring to the words quoted, and saying: "No further particulars necessary." "The mere fact of Crichton permitting his name to be used in connection with an advertisement of a patent medicine, which, apparently, this is, is sufficient to bring him within the wording of the Act. We cannot see that we can give any further particulars": letter, April 23rd, 1906.

Thereupon and thereafter the inquiry was resumed, and a second trial had, with the taking of further evidence, in addition to what had been given on the former inquiry.

The rule of law in such trials is that "the accused person is not to be taken unawares. . . . Full particulars should be given, so

that he may be fully apprised with what he is being specifically charged": *Re Washington* (1893), 23 O.R. 299, at p. 309. The charge was not substantially varied from what it was at first, and the new evidence given was not essentially different from the old, with this single exception, that "Grippura" had been meanwhile analyzed, and its ingredients reported as being about 8 per cent. of hydriodic acid and the rest glycerine and water. This analysis was *ex parte*, and the accused asserts that, in addition to these, there are other ingredients, which he did not disclose.

Dr. Crichton was again called, and repeated his honest belief that all the statements were true. He referred to Dr. Smith, a medical graduate of Queen's (not licensed in this Province), who writes: "After using thirty bottles" (not personally, I assume) "he was convinced that many of the statements in the circular are true." He also repeats his offer to have the medicine tested by other doctors in fair cases or in any hospital.

The prosecutor then called Dr. Pyne to prove his analysis. He said "it is disgraceful to advertise something and to get money by it, when it will not cure. It would be misrepresentation and misleading. That composition would cure nothing that I know of. I would not say it is impossible to cure anything, but I do not know that it does. It is because it is against professional etiquette (to advertise cures and to keep remedies secret) that I say it is disgraceful and infamous—that is, from a doctor's point of view. If the statements are true, I would not consider it disgraceful in an ordinary person to publish, but in a doctor it is contrary to rules laid down by the Ontario Medical Council, and would be disgraceful."

(I would just note here that the accused was admitted to practice before these rules were passed by the council.)

He continued: "Hydriodic acid is not in the British Pharmacopœia; it is not recognized as an official preparation; it is hardly used at all. It is supposed to act as an alterative and lowerer of the temperature. but that does not seem to be stated on very good authority. . . . It is probable it may have that effect."

Dr. Field, having heard read the analysis as to "Grippura," said: "It is absolutely worthless. I never tried it for gripe."

In re-examination, he is asked: "It would be imposing on the

D.C.  
1906  
RE  
CRICHTON.  
Boyd, C.

D. C.

1906

RE  
CRICHTON.

Boyd, C.

credulity of the people?" A. "Yes; obtaining money for something which was not true."

Mr. Kerr objects to the leading, and asks: "If it does what they say, the people are not being defrauded?" A. "If it does what he says, they are not."

Dr. Ferris, again examined, said: "It was infamous to withhold a valuable remedy from the profession, if it was, as claimed, of general benefit." "And that the statements in the circular are infamous and disgraceful, from a medical standpoint."

Upon all the evidence the committee then made a written report to the council, finding proved the charge that the appellant did infamously, disgracefully, improperly, and unprofessionally advertise, and also that the said appellant endeavoured to impose on the credulity of the public for the purpose of gain by attempting to deceive the said persons as might read (*sic*) the said advertisements.

My brother Mabey has commented on the refusal to furnish particulars and to supply a copy of the first evidence, and in the apparent neglect of the council to read or master all the evidence; and I agree with his observations on these points.

I proceed to what was said by and before the council when the report was adopted. Dr. C.: "The question is a very simple one. It is not whether this man has violated any code of ethics or not. . . . It is not whether he has advertised or not. The question is simply this: He is an educated man, medically educated, and a graduate of the college. Can an educated medical man, acquainted with the action of drugs, advertise to the whole community that a remedy which he keeps secret, but which consists of a few drops of hydriodic acid, (will) cure any particular disease and every case of it in an hour or two? Is that fraud or not?" Dr. H.: "It is fraud, of course."

Dr. B. (the chairman of committee): "This man has had two trials. There was evidence taken at both of these trials, and . . . I maintain that he has been conducting a fraud, and . . . the council cannot do anything else than strike him off the registry."

The President: "Not to punish him, but to protect the people."

Upon which the motion to adopt was carried, one member not voting and one member voting "nay": report of 1906-7.

The report was then affirmed, with the rider, disclosing a new

phase of the investigation, the result of which was that the *bona fides* and truthfulness of the appellant are negatived, and his fraudulent and deceitful conduct affirmed. Without taking him to task on these grounds, it is, in effect, assumed that he did not and could not believe in the efficacy of his alleged discovery; that what was put forth in his circular was false; that, acting as an imposter, he seeks to impose upon and lead astray a credulous public; and that his whole conduct was fraudulent, with intent to deceive the community for his own personal gain.

Surely, in an investigation of such serious moment, involving professional extinction to the party inculpated, there should have been at the outset the charge formulated in this aspect of fraud and falsity. The whole evidence for the defence must have assumed a very different aspect had the prosecution been framed and conducted on these lines.

Starting with the simple yet comprehensive charge that the man advertised his business, setting forth the curative virtues of his medicine (which, of itself, in the opinion of the witnesses, constituted infamous and disgraceful conduct from a professional point of view), this was covertly directed during the course of the proceedings, so that, in the issue, it is found that the statements in the circular were false; that he knew them to be false; that he made them with intent to deceive and impose on the public; and that the whole system of falsehood and imposition was merely for the purpose of making money.

I might stop at this point, and say nothing more; but, in view of what was argued, and having regard to the tenor of the evidence and the offer to test the remedy, it may not be improper to say something about the law and other surroundings of the case.

No doubt the Provincial legislation was suggested by the provision found in the English Medical Act of 1858, 21 & 22 Vict. ch. 90, sec. 29. By this, if a medical practitioner was, after due inquiry, adjudged by the Medical Council to have been guilty of infamous conduct in any professional respect, his name may be erased. The council were made the sole judges, and no appeal lay, if one was found guilty by the council after due inquiry. But internal evidence indicates that the real original of our statute is sec. 13 of the English Dentists' Act of 1878, 41 & 42 Vict. ch. 33, by which it is enacted that if a person registered as a dentist has

D. C.

1906

RE  
CRICHTON.

Boyd, C.



D. C.  
1906  
RE  
CRICHTON.  
Bayd, C.

been guilty of any infamous or disgraceful conduct in a professional respect, he shall be liable to have his name erased by the council. Other provisions followed as to trivial offences, etc., which are found in our legislation, thus ear-marking its origin. The section of the Ontario Act applicable to this prosecution first appeared as a new provision by way of amendment to the existing Medical Act in 1887, 50 & 51 Vict. ch. 24, sec. 3, 34 (1), which is now found in R.S.O., ch. 176, sec. 33 (1), 1897. Power is given to the council to erase the name of any registered physician who has been guilty "of any infamous or disgraceful conduct in a professional respect." These words have been located in the mouths of witnesses as if the last word was "aspect," and not "respect." The meaning of the statute is not what is "infamous" or "disgraceful" from a professional point of view or as regarded by a doctor, and as construed in the light of the written or unwritten ethics of the profession; it is whether his conduct in the practice of his profession has been infamous or disgraceful in the ordinary sense of the epithets, and according to the common judgment of men. The language of the English Judges as to the words in the Medical Act afford a good definition.

In *Allinson v. General Council of Medical Education and Registration*, [1894] 1 Q.B. 750, at p. 760, Lord Esher, Master of the Rolls, and his brethren, construe the words "infamous misconduct in a professional respect" thus: "If it is shewn that a medical man, in the pursuit of his profession, has done something with regard to it which would be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competency, then it is open to the General Medical Council to say that he has been guilty of 'infamous conduct in a professional respect.'"

The meaning is, perhaps, made more clear when we couple to this the words of Bowen, L.J. (speaking as to the Medical Act) upon "a charge of infamous conduct in some professional respect," "and the particulars which should be brought to his attention in order to enable him to meet that charge ought to be particulars of conduct which, if established, is capable of being viewed by honest men as conduct which is infamous. . . . If . . . nothing was brought before the tribunal which could raise in the minds of honest persons the inference that infamous conduct had been established, that would go to shew that there had not been a

due inquiry": *Leeson v. General Council of Medical Education and Registration* (1889) 43 Ch.D. 366, at p. 383-4; *Regina v. General Council of Medical Education and Registration* (1861), 3 E. & E. 525. The Judges, Crompton, J., and Hill, J., treated the phrase "infamous conduct in a professional respect" "as equivalent to infamous professional conduct."

Now, the essence of the inquiry here is (not as it was begun, but as the committee regarded it at the end)—falsehood or no falsehood; fraud or no fraud; deceit or no deceit.

As said by Halsbury, L.C., in *Beneficed Clerk v. Lea*, [1897] A.C. 226, at p. 230: "A false statement made knowingly in order to gain some benefit is, whatever is the subject matter of the statute, and in every sense of the term, an immoral act." And as "to defraud" and "to deceive," we cannot find a more terse or happy elucidation of the meaning than is given by Mr. Justice Buckley in *Re London and Globe Finance Corporation (Limited)* (1903) 10 Mans. B.C. 198, at p. 202: "'To deceive' is . . . to induce a man to believe that a thing is true which is false, and which the person practising the deceit knows or believes to be false. 'To defraud' is to deprive by deceit; it is by deceit to induce a man to act to his injury. More tersely, it may be put that 'to deceive' is by falsehood to induce a state of mind; 'to defraud' is by deceit to induce a course of action."

Thus tested, how stands the evidence? The statements made were believed to be true by the appellant, and he is a man of learning and of professional skill; and, besides, in good repute for truth and integrity. The fact of "Grippura" being efficacious is attested by the written certificates of people of intelligence and of well-known reputable character; some of them also of medical learning. As a proof of *bona fides*, the physician offers to submit his medicine to any fair test, and in the books and pamphlets laid before us it is manifest that hydriodic acid is now well known, and is accounted to be of varied excellence by American physicians, against whose competence no suggestion has been made.

On the other hand, expert opinion is offered of the worthlessness of hydriodic acid by gentlemen of the medical profession, who do not know and have not used or tried the acid. Surely the better plan is to waive matters of personal etiquette, and have the thing

D. C.  
1906  
—  
RE  
CRICHTON.  
—  
Boyd, C.

D. C.

1906

RE  
CRICHTON.

Boyd, C.

brought to a practical, satisfactory, as well as scientific test by skilled observers in applied medicine.

The broad distinction between the *Washington* case, 23 O.R. 299 (from which judgment the framers of the "rider" in this case appeared to have borrowed their language) and the present is that there he dared not or would not or did not deny what was charged against him. By his silence he, in effect, confessed its truth and admitted its falsehood. The false statement there acted upon by the council and confirmed by the Court as sufficient to be "infamous" was the representation that persons in the last stage of consumption were suffering from catarrhal bronchitis, and that he could cure them.

Now, I am far from belittling the importance of professional ethics in regard to physicians or other learned professions. There is no doubt that this man has grievously offended against their conventional rules, well recognized, though it may be not forming a written code, which obtains among the members of every learned and honourable profession. In two respects he has violated proper decorum—modesty and propriety have been forgotten in his self-advertising and discreditable proclamation; and he has, in the second place, kept to himself and for himself this apparently valuable remedy, and has not made known the formula, in order that its benefits may be shared in by the profession and the public.

But neither of these offences against the comity of the profession invites *per se* imputation of moral delinquency, which is, I think, contemplated by the terms "infamous and disgraceful." Yet the obnoxious conduct is sufficient to put the offender practically outside of the professional pale, but whether it can call down the statutory punishment of exclusion from practice seems to me as at present advised, to be answerable in the negative.

To revert to the advertising question, the English rule against it, even in the most modest form, is exceedingly strict. Not so in America and Canada, where a moderate and limited use of advertisement is permissible. One reason of this rule (though there are others) grows out of the desire to mark emphatically the distinction between a trade and a profession. In the case of a mere money-making business, advertising in any and every extreme of extravagance and exaggeration is considered a legitimate outcome of sharp competition. The professional man, however, is not on this

plane; he is not to thrust himself forward and solicit, particularly by any form of public appeal. It was regarded in the profession as a badge of charlatanism to advertise in any but the simplest way of giving notice of the whereabouts of the practitioner's office. The vendor of patent medicines and proprietary remedies might puff their uses and publish their testimonials and tout for customers, but not the physicians. No doubt, as said Dr. R. Brudenell Carter: "Medical men, from the necessity of living, have become indifferent to the censures of the body of the profession or to the knowledge that they are offending against the great consensus of professional opinion. They have a living to get, and they get it by such means as offer themselves. Competition induces struggling physicians to follow courses not always consistent with self-respect, and which fall short of a high standard of honour and propriety." II. International Treatise of Ethics, p. 28. This is the shelter under which the appellant takes refuge, and, though his action may be undesirable and reprehensible, derogatory to himself and injurious to the higher interests of the profession, it, perhaps, has to be left to himself as to its discontinuance.

To deal further with his "secretiveness," as a witness calls it; the rules which govern English medical practice (*e.g.*, those promulgated by the Royal College of Physicians and of Surgeons) forbid the use of secret remedies and methods of treatment, and the rule is enforced by appropriate penalties. These secret remedies (commonly called nostrums) are special preparations of which the formulæ are unknown in whole or in part. The reason why they should not be encouraged—because it is unscientific to prescribe a dose of anything the nature of which the physician does not know. Hence, it easily follows that if one discovers something which proves of real efficacy in disease, the ethical claims of the profession persuade, if not compel, him, to place his discovery at the disposal of his brethren and the public, without other reward than professional approval and public esteem.

If, however, a stronger compulsion, arising out of his own needs and the stress of competition among the ranks of a crowded profession, overmaster this ethical claim, and he retains control and proprietorship of his nostrum, then he has to incur the condemnation of his fellows in placing money above the high standard of his profession.

D. C.  
1906  
RE  
CRICHTON.  
Boyd, C.



D. C.  
1906  
RE  
CRICHTON.  
Boyd, C.

There is, however, a distinction marked in the cases between patent and proprietary medicines. Patent medicines are, properly, those the component parts of which are of record in the patent office, and any one can by inquiry find out of what they are made up, whereas the ingredients of a nostrum or proprietary medicine can only be ascertained by analysis: *Pharmaceutical Society v. Armson*, [1894] 2 Q.B. 720, at p. 726.

It is permissible for the physician to prescribe this kind of patent medicine; and even as to nostrums, there is to be observed, if knowledge exists or is obtained of the substantial ingredients entering into the composition of the secret remedy, then its use might be justified both by the discoverer and other members of the profession: Dr. Saundby's *Medical Ethics* (1902), p. 67.

I think there is no doubt, but that the substantial ingredient which gives importance to "Grippura" has been laid bare by analysis, and that it is sufficiently made known to the profession to induce the next step (which I venture to recommend), namely, to apply the practical test as to its alleged efficacy in various ailments.

If the use of hydriodic acid in this and other like preparations known and prescribed by United States physicians is, in truth, an agent of varied use and value in the treatment of disease, it is surely the thing to be taken up by the profession and applied to public needs. If, after satisfactory testing, it stands approved, it will not need to be circulated by advertising as a valuable secret, but will be generally prescribed and distributed by the profession and used by their patients.

There appears to me to be a good suggestion in the view presented by Dr. Saundby (though he writes of cases which do not respond to the usual treatment). He writes: "The application of new methods of treatment or new remedies ought not to be undertaken without due and great care. The general reason for such experiments is the impossibility of progress without the trial of new suggestions, and on particular grounds the remedy may be resorted to, if there is reasonable prospect of its affording relief, and that it is harmless": *Medical Ethics* (1902), p. 55.

Upon the present evidence, it does not appear to be proved (always assuming honesty and fair dealing to begin with) that the alleged discovery is a mere pretence; that the remedy is worth-

less, and neither cures nor helps those who take it; that the whole scheme is a delusion; that it is put forward dishonestly or carelessly, not for the good of the public, but for the gain of the advertiser.

If, however, it fails to stand the scientific as well as the empirical testing, the situation may be very materially changed. The question after that would probably be whether he could reasonably and sincerely retain faith in the virtues of "Grippura," and honestly recommend and advertise it on that footing.

The Medical Council does not appear to possess such extensive power to discipline and exclude delinquents as had been given by the legislature to the Law Society. To the Benchers is entrusted power to inquire into the conduct of lawyers who are charged with professional misconduct or of conduct unbecoming a member of the Law Society: R.S.O. 1897, ch. 172, sec. 44. Under such language there is power to deal with cases where the charge is a violation of the conventional or other regulations which are either described or commonly observed in the profession: see *Re Rythe* (1866), 6 B. & S. 704, *per* Cockburn, C.J.

So, to a more limited extent, in medicine, if one has been admitted to practice on certain explicit conditions and has given an undertaking to observe them (*e.g.*, a promise not to advertise in any offensive way), his breach of the engagement might well be regarded, if wilfully and deliberately made, as disgraceful conduct in a professional respect. Such a case was considered in *Ex p. Partridge* (1887), 19 Q.B.D. 467, and again in the same connection in *Partridge v. General Medical Council of Medical Education and Registration* (1890), 25 Q.B.D. 95.

That element is wanting in the case now in hand; at all events, no definite delinquency is charged in that respect, for no code of medical ethics was in force here till about 1898. Before that time the method of confining one's self to medical ethics or etiquette rested in the honour and good sense of the individual.

The conclusion I reach is that there has not been a due inquiry in this Crichton case, and the appeal should be allowed. As a consequence, his name (if struck off) should be restored to the register; but this judgment is to be without prejudice to the question whether on subsequent inquiry there may not appear to be

D. C.  
1906  
RE  
CRICHTON.  
Boyd, C.

D.C.

1906

RE  
CRICHTON.

Boyd, C.

proper ground for erasing his name. This is the term which was imposed in the *Partridge* case, 25 Q.B.D. 95.

As to costs, I cannot say that this proceeding has been frivolous or vexations. The conduct of the appellant has been such as to provoke complaint and to invite investigation. It has offended against the provisions of the Ontario Code of Ethics, which declare it to be derogatory to the dignity and prestige of the profession to resort to the practice of secrecy on the one hand and publicity on the other—which, though not in force when he was registered, yet declare the professional standard of conduct which he has disregarded, to set up a trade standard for himself, so that, while in the result he may be right legally, he is wrong professionally.

Having regard to these and like considerations, I do not think that the council, who are discharging a quasi-public duty, should be called upon to pay costs of the investigation or of this appeal.

MAGEE, J.:—I concur fully in the admirable judgment of my Lord the Chancellor, and have but little to add as to the proceedings taken against the appellant.

Under sec. 33 of the Ontario Medical Act, the Council may cause inquiry to be made into the case of a person alleged to be liable to have his name erased from the register; and sec. 35 enacts that the council shall ascertain the facts by a committee, and a written report of the committee may be acted upon, and a standing committee is to be maintained for such purposes.

By sub-sec. 5 of the same section, notice of the meeting held for “taking the evidence or otherwise ascertaining the facts” shall be served upon the person whose conduct is the subject of inquiry, and such notice shall embody a copy of the charges made against him or a statement of the subject matter of the inquiry.

The by-laws of the council, as published in the annual announcement, which is among the exhibits, also provide for a committee on discipline, whose duty it is to consider all complaints against members that may be referred to it by the council, and shall be governed in its procedure by the statute; and the by-laws also provide that a committee appointed to report on any subject referred to them by the council shall report a statement of facts, and also their opinion thereon in writing.

In this case the council adopted a report of the standing committee on discipline recommending that "the cases of alleged unprofessional conduct on the part of Dr. A. Crichton (and another doctor named) be referred to the committee on discipline for investigation. Nowhere do I find that any charge of "infamous or disgraceful conduct" was referred by the council to the committee.

The committee, acting under this resolution, held two meetings for inquiry, the first on the 10th of February, 1905, and the second on the 7th of May, 1906. For each of these meetings a separate notice was served on Dr. Crichton, purporting to specify the charge to be made. The two notices differed in the specific charges, and neither referred to the other. Before the second meeting the committee reported upon the first charge that they had not arrived at a conclusion, and asked leave to further consider it. They have never since brought in any finding upon that charge. It is only the second charge that they have reported proved, adding to it a finding upon something that Dr. Crichton was not charged with upon either occasion. On the second meeting, in May, 1906, it was agreed that the evidence given in February, 1905, by two witnesses for the defence and one for the prosecution should be taken as if given again. Apart from that none of the evidence at the first meeting should be availed of on the second charge, and, indeed, Dr. Crichton's counsel was informed that he would not be entitled to a copy of it unless it were made a part of the inquiry. So that the evidence on the only charge reported upon by the committee was but a small part of the evidence relied to support the action of the council.

The committee did not comply with the statute or by-law by ascertaining or reporting facts upon which the council could act, but they simply laid before the council the whole evidence, and assumed to themselves the duty of the council in finding the accused guilty. The unfairness of the course pursued is manifest on a reference to what occurred when the report was presented, and the resolution for erasing the name passed. "Dr. Adams: 'May I ask if there is anything in the statement that the accused made before he left the room that no man is allowed to or should give his vote unless he has had the evidence in both trials. I, for one, have not had the opportunity.' The President: 'I think the registrar caused Mr. Rose to place a copy of the evidence before

D.C.  
1906  
RE  
CRICHTON.  
Magee, J.



D. C.  
1906  
RE  
CRICHTON.  
Magee, J.

every member seated.' Mr. Curry: 'Any man, if he is satisfied with the finding of the committee, has a perfect right to vote. There is no onus on him to read over any more evidence than he wants to.'" Thus the committee not only undertook to investigate the charges of "infamous and disgraceful conduct," which had not been deputed to them to inquire into, but they also undertook to find it proven, and to add matters which had not been contained in the charge made, and the council were informed they could act upon that.

It is proper, I think, also to call attention to the evidence itself. Each of the medical practitioners called was asked to give his opinion as to the conduct being infamous or disgraceful in a professional respect. This was practically asking each to decide that which the council itself is the proper tribunal for the decision of. The testimony of this sort makes up the bulk of that given. Its value in other ways has been fully dealt with in the judgment of my Lord the Chancellor. They could not be expected to speak from their own experience or professional knowledge as to the effect or value of a remedy the composition of which was unknown to them, and which, in consequence, none of them dare take the responsibility of prescribing. By keeping secret the ingredients in his alleged discovery, whether it was new or old and whether beneficial or not, he effectually prevented other physicians from making use of it or assuming any responsibility for its use by him, and he was thereby endeavouring to cut both them and the public off from the benefit even of consultation between other physicians and himself. By advertising it as a remedy for so many diseases, over his name, with the added standing he derived as a member of the college, and recommending the purchase of it, and doing this for gain, he was, in fact, inviting the public to place confidence in him as a physician, and to pay him for the remedy he put forward—and this to the exclusion of confidence in other practitioners. It is the duty of a physician towards those he induces to place reliance upon him, and to pay him for the benefit to be conferred, that he recommends for their ailments the best available remedy known to him in each case, and not to protract or palter with disease by putting forward, for the sake of gain, something which he knows may be quite inert, or but slightly alleviate or be curative, even if not harmful. When the latter course is adopted, and, in addition,

secrecy is adhered to, and disclosure thereby prevented of the total or comparative ineffectiveness of the remedy, the conduct might well be classed as disgraceful, and, if the evidence were precise enough and the proceedings regular, a court might not feel called upon to interfere with a decision which so characterised it.

The appeal should be allowed, and the appellant's name restored, if erased, in the register.

MABEE, J.:—Under the Ontario Medical Act, the council may direct the erasure from the register of a practitioner who has been found to have been guilty “of any infamous or disgraceful conduct in a professional respect.” The Act provides the machinery for ascertaining the facts connected with the particular charge or complaint, and witnesses may be summoned and evidence taken upon oath before a committee appointed by the council.

In January, 1905, Dr. Crichton was charged with having printed and issued to the public, and to the drug trade, certain circulars and advertisements as to the efficacy of “Grippura” as a cure for grippe and influenza, and that, in so doing, he had been guilty of infamous and disgraceful conduct in a professional respect.

The hearing came on before the committee at Cobourg on the 10th of February, 1905, and at the opening of the proceedings counsel for Dr. Crichton stated that he had asked for particulars of the portions of the circulars that were objected to, but had received none, and thereupon requested the counsel for the prosecution to point out the particular points in the circular that were considered infamous and disgraceful in a professional respect, so that cross-examination might be directed to those points; that he found it difficult to meet the charge, and that it might mean calling a large number of witnesses at great expense.

The importance of this lay in the fact that the circular contained a large number of testimonials and letters from persons who had used the medicine, and names of others to whom it had been sold and used with alleged beneficial results, and the case for the defence was to be that the testimonials were genuine; that the names given were those of existing persons who would testify to the benefits received by them from using the medicine, and that the statements in the circular were true. Particulars were again

D.C.

1906

RE

CRICHTON.

Magee, J.

D. C.  
1906  
RE  
CRICHTON.  
Mabee, J.

refused; and the demand was answered by the statement that the charges were within "*the four walls of the circular.*"

The case then proceeded, and evidence was given at large, and the prosecution was allowed to attack the truth of some of the statements appearing in the circular, although, as I think, from the course taken, that was not put in issue, and that the charge was limited to merely printing and issuing the circular—in other words, mere advertising.

Dr. Crichton was called by the prosecution, and examined at great length. He stated that all the testimonials were genuine, and the references given were to persons who had purchased and used the medicine, and that all the statements contained in the circular were true. He offered to submit the medicine to any hospital or other test that might be suggested, but his offer was declined or not accepted.

Several doctors were examined for the prosecution. None of them had ever used the medicine; they did not know the formula. Some of them stated that, in their opinion, Dr. Crichton had offended against the statute, but, in cross-examination, it is apparent that some of them regarded the sending out of a circular by a medical man as an offence within the Act, even if all the statements made in it were true. On July 5th, 1905, the committee reported to the Medical Council that, after considering the evidence, they had failed to arrive at a conclusion, and asked leave to further consider the evidence, exhibits, and case generally.

In April, 1906, the appellant was served with another notice. The particulars set forth in it were that he "did infamously, disgracefully, *improperly*, and *unprofessionally* advertise and distribute advertising circulars claiming to have discovered a remedy which would cure la grippe or influenza in a few hours, and assist in curing a number of other diseases, and did, through said advertising circular, solicit and request that all letters of inquiry in reference to said remedy be sent to him, . . . and that said advertising pamphlets did appear, and were distributed to some of the residents of the county of Northumberland and throughout the Province of Ontario."

It will be observed this goes much beyond the first charge, and beyond the statute, as the words *improperly* and *unprofessionally* are not found there.

The committee sat at Cobourg on May 7th, and Dr. Crichton's counsel asked if it was a continuation of the former inquiry, and was told that it was. He then contended that he was entitled to put in as part of the case the proceedings of the Medical Council connected with the report made by the committee on July 5th, 1905. This was objected to. Demand was also made, upon his behalf, for a copy of the evidence taken at the former sitting, and, although it appears he had offered to pay for a copy, such copy was refused him, and the case proceeded, counsel for the prosecution having a copy of all the former evidence, and counsel for the appellant being compelled to conduct his case as best he could without the assistance of the evidence already given. Several more witnesses were examined, and the only additional evidence given of any importance was an analysis of the medicine that had been advertised. Dr. Crichton had refused to give the formula, and stated that this analysis did not shew all the ingredients. On July 3rd, 1906, the committee reported to the council that the appellant had been "guilty of infamous and disgraceful conduct in a professional respect," and that he "had endeavoured to impose upon the credulity of the public for the purpose of gain by attempting to deceive the said persons as might read the said advertisements;" and the council, on July 6th, adopted the report, and ordered Dr. Crichton's name to be erased from the register.

Section 36 of the Act gives the right to a medical practitioner, whose name has been erased, to bring the whole matter before a Divisional Court for review, and the Court may order the restoration of the name so erased, and also make such order as to costs as to the Court shall seem right.

I think there is a wide distinction between mere advertising—that is, simply sending out advertisements containing truthful statements—and deceitful and fraudulent advertising—that is, putting before the public false and untrue statements. At the opening of the inquiry an attempt was made to ascertain whether the truth of the statements in these circulars was questioned, and the appellant was practically told that all he was charged with was advertising, and, as I have said, the truth of the matter advertised was not put in issue. The appellant is admitted to honestly believe in the virtue of his compound; he positively denies any deception or attempt to deceive; he produces a large number of

D. C.

1906

RE

CRICHTON.

Mabee, J



D.C.  
1906  
RE  
CRICHTON.  
Mabee, J.

letters from various parts of the Province testifying to the benefit received from his medicine. These are from gentlemen of standing and of education, and it is fair to assume some, or many of them, could have been subpoenaed to give evidence upon behalf of the appellant had not the course taken by the prosecution made that step unnecessary. It seems to me most unfair and improper simply to make a charge of advertising, and then convict of deceitful and fraudulent advertising. Such a thing could not take place in a court of justice, and should not be permitted in a case where the loss of a man's profession is at stake.

I am also of the opinion that there is no sufficient or proper evidence upon which the appellant could be convicted of deceitful advertising, or attempting to impose upon the credulity of the public. The good faith of the appellant and his honest belief is admitted; his offer to submit his compound to a hospital or other test, and the refusal by the prosecution cannot be overlooked; the written certificates of persons who had used the medicine are admitted to be genuine; and against this is only the opinion of a few medical men, who have never used it, and may not know all its component parts.

It plainly appears from the evidence of all those called for the prosecution that the mere sending out of these circulars, quite apart from the truth or falsity of the contents, was offensive to them, and regarded by them as being unprofessional and a disgraceful thing for a medical man to do.

No doubt this sort of advertising is quite opposed to the ethics of the profession, and one can have entire sympathy with those who stand firmly for high professional honour and the upholding of the dignity and best traditions of the medical profession. Much can be said in favour of the necessity of the council having wide and extensive powers over the members of the profession to the end that the standard of dignity may be maintained. On the other hand, it is equally the duty of the Court to see that the powers of the council have been fairly and properly exercised; that the man charged has had a fair trial, and been convicted upon evidence that would have justified a conviction had he been upon trial for an offence in the Criminal Court, and, no matter how strongly I may desire to assist the council in their endeavours to put down what they regard as disgraceful or infamous conduct, I am driven

to the view that Dr. Crichton has not had a fair trial, and has not been properly convicted. The Medical Act provides for the election of the council, and sec. 35 is as follows: "The council shall, for the purpose of exercising in any case the power of erasing from and of restoring to the register the name of any person or any entry, ascertain the facts of such case by a committee of their own body, not exceeding five in number, of whom the quorum shall be not less than three, and a written report of the committee may be acted upon for the purpose of the exercise of the said powers by the council."

Now, in July, when the report of the committee came before the council, and the motion was made to erase the name from the register, there were some 27 or 28 members present. It is apparent that the moving reason for the motion carrying was that Dr. Crichton had been "*conducting a fraud*"—it is so put by several of the members of the council; he had not been charged with that—and it was so pointed out to the committee at the time by counsel for Dr. Crichton; and again complaint was made of the manner in which the proceedings had been carried on, and of the refusal to furnish a copy of the evidence at the first inquiry. I cannot believe that the members of the council read the evidence that had been taken. As Dr. Crichton was asked to retire, he made the following statement: "It has been admitted at a previous trial that the High Court expects every man to have read this evidence before he comes to his decision." After he returned, one of the members asked if there was anything in the statement of the accused that no one was allowed to or should give his vote unless he had read the evidence on both trials, and that he, for one, had not had an opportunity. The president then said he thought the registrar caused a copy of the evidence to be placed before every member seated. The solicitor for the Discipline Committee is reported as thereupon stating: "Any man, if he is satisfied with the finding of the committee, has a perfect right to vote. There is no onus on him to read over any more evidence than he wants to." This may be strictly accurate, if it means that if a member reads enough of the evidence to satisfy himself that the report of the committee is well founded he need not read it all. If, on the other hand, it means that the members of the committee need read none of the evidence, but may act on the report alone, if they so

D. C.  
1906  
RE  
CRICHTON.  
Mabee, J.

D. C.  
1906  
RE  
CRICHTON.  
Mabee, J.

choose, it is not in harmony with what the Court said in *Dr. Washington's* case, where it is distinctly stated that the members of the council should read the evidence. This man was entitled to the individual judgment of each member of the council, and, from the report of what took place, I am not satisfied he had it.

Complaint was made throughout the trial that Dr. Crichton refused to make the formula of his medicine public, and this was said to be against proper practice. It may be so. He was not charged with that, and was not convicted of it.

I do not deal with what was said upon the argument about the beneficial use of this medicine, or some of its component parts, in the class of troubles set forth in the circular, nor do I think it needful to make reference to the medical works that were referred to, as, in the view I take of the case, it is not necessary to do so. The charge was mere advertising; he was convicted of fraud, or something he was not charged with.

The evidence is not sufficient to convict of fraud, even if he had been so charged, and the trial has not been conducted with those safeguards that should be carefully observed upon a case fraught with so serious consequences as the present.

I have not overlooked the fact that it was objected to our admitting upon this appeal, the proceedings of the council when the vote was taken, but I think they are admissible.

I would allow the appeal, and order the name to be reinstated.

G.F.H.

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[IN CHAMBERS.]

MONTGOMERY v. RYAN.

1906

Dec. 4.

*Jury—Trial in Toronto—Investigation of Accounts—Striking out Jury Notice.*

The practice where the venue in an action is laid out of Toronto is, except in rare cases, to leave the matter to be dealt with by the trial judge; but in Toronto, where there are separate sittings for jury and non-jury cases, the latter being practically a continuous sitting throughout the year, the practice has been adopted, in order to prevent the jury list from being unduly encumbered, to strike out the jury notice in cases which properly ought to be tried without a jury.

In an action on a promissory note, which involved an investigation of accounts, and therefore properly triable without a jury, an order was made in Chambers directing such notice to be struck out.

THIS was a motion by the plaintiff to strike out a jury notice served by the defendant. No irregularity was set up, so that there was no jurisdiction in the Master to entertain the motion which was therefore addressed to the discretion of the Court.

The action was brought on a promissory note under which the amount of \$8,000 was claimed to be due, the venue being laid at Toronto.

The defence was that as to \$4,000, part of amount, there had been an overcharge of interest, which had the effect of wiping out or paying off that amount.

On December 4th, 1906, the motion was heard before MEREDITH, C.J.C.P., in Chambers.

*W. N. Ferguson*, for the plaintiff.

*W. M. Hall*, for the defendant.

At the close of the argument the learned Chief Justice delivered the following judgment.

MEREDITH, C.J.:—I think the jury notice must be struck out. It is a matter of discretion whether it should be or not. While the practice where the venue is laid out of Toronto is not, except in rare cases, to make an order in Chambers but to leave the matter to be dealt with by the trial Judge, a different practice is adopted where the venue is laid in Toronto and there are separate sittings for the trial of jury and non-jury cases, the latter prac-



Meredith, C.J. tically a continuous sitting throughout the year, and in such cases,  
1906 if the action is one that plainly ought to be tried without a  
MONT- jury, in order to prevent the jury list from being encumbered with  
GOMERY such cases, very considerable expense put upon the city, county  
v. or Province, because other jury cases would have to wait while  
RYAN. such cases are being tried without a jury, the practice is to strike  
out the jury notice.

This is plainly a case which would be tried without a jury—  
one of investigation of accounts. The order must go. Costs in  
the cause.

G. F. H.

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[MEREDITH, C.J.C.P.]

RE GAMBLE.

1906

Dec. 8.

*Will—Devise to Two Persons—Death of One Before Testator—Lands and Personality—Lapse—Residue—Tenants in Common—Joint Tenants—Survivorship.*

A testator, by his will, amongst other provisions, devised certain land to two sisters, naming them, to whom he also gave his residuary estate. One of the sisters predeceased the testator:—

*Held*, that as regards the land, the sisters would have taken as tenants in common, and therefore as to the deceased sister's share there was a lapse and it was undisposed of, but as to the personality they would have taken as joint tenants, and the survivor took the whole.

THIS was an originating notice for the determination of questions arising upon the will of the testator, Joseph Gamble.

The matter was argued before MEREDITH, C.J.C.P., in Weekly Court, on December 5th, 1906.

*H. Morrison*, for executors.

*P. A. Malcolmson*, for Mary Ann Carter.

*F. W. Harcourt*, Official Guardian, for infants and other persons represented by him under order of Britton, J., dated 15th November, 1906.

December 8. MEREDITH, C.J.:—The will is dated the 8th March, 1898, and by it the testator devised to his nephew Michael Gamble a farm in the township of Kinloss, and to his sisters Mary Ann Carter and Catharine Harbourne, another farm in the same township, and after bequeathing a legacy of \$300 to his nephew Wilfred Gamble to be paid by Michael Gamble, and appointing his executors, the residue of the testator's property was devised to Mary Ann Carter and Catharine Harbourne.

Catharine Harbourne died in the testator's lifetime, and by force of sec. 27 of the Wills Act, the undivided one-half of the Kinloss farm to which she would have been entitled if she had survived him is included in the gift of the residue.

The residue consists of the Kinloss farm and certain personal property of which the testator died possessed; and the question

Meredith, C.J. for decision is whether the share of the residue which Catharine  
1906 Harbourne would have taken had she survived the testator lapsed  
RE and is therefore undisposed of, or whether she and Mary Ann Carter  
GAMBLE. were joint tenants of the subject of the residuary disposition and  
the survivor Mary Ann Carter is therefore entitled to the whole.

There can be no doubt, I think, that as to so much of the residue as is real estate the devisees would have taken as tenants in common had Catharine Harbourne survived the testator (R.S.O., ch. 119, sec. 11); and it follows that as to the undivided half devised to her there was a lapse, and it is undisposed of.

As to so much of the residue as consists of personalty, the residuary bequest is to the legatees as joint tenants, and the survivor is therefore entitled to the whole of it.

It was suggested as leading to a contrary conclusion that the blending together in the residuary gift of the real and personal estate was an indication of a contrary intention, within the meaning of sec. 27 of the Wills Act, but I am not of that opinion.

There is no more reason for thinking that this blending indicates an intention that the beneficiaries should take in the same way as legatees of personal property take, than that it is an indication that the personal property should go as real estate which is devised to two or more persons does under the provisions of sec. 11 of R.S.O., ch. 119. The disposition is not, therefore, taken out of the ordinary rule, and the devise of the real estate is to the devisees as tenants in common, and the bequest of the personal property is to them as joint tenants.

By an oversight, provision was not made in the order of my brother Britton for the representation of Michael Gamble, a nephew of the testator. In order that his interest may be bound, the judgment made on this motion may provide that he is to be and is represented by the Official Guardian.

No case was made on the evidence for dealing with the other question sought to be raised by the notice of motion.

The result is that there will be judgment declaring the true construction of the will in accordance with the opinion I have expressed, and the costs of all parties will be paid out of the estate, those of the executors as between solicitor and client.

## [DIVISIONAL COURT.]

BOHAN V. GALBRAITH.

D. C.

1906

*Vendor and Purchaser—Contract for Sale of Land—Specific Performance—Correspondence—Offer—Quasi-acceptance—Agent.*

Nov. 7.

1907

Jan. 15.

The defendant, the owner of land in Ontario, being abroad, arranged with an estate agent to send him any offers of purchase which he might receive. The plaintiff filled up and signed a printed form offering \$13,000, naming terms of payment and other details. This was sent by the agent to the defendant, who refused it. The plaintiff then signed another offer of \$14,000, on a similar form, half cash, balance payable by instalments, offer to be accepted by a certain day, and sale to be completed by a certain day. This was sent by the agent to the defendant, who, upon receiving it, wrote to the agent a letter in which he intimated that he would take \$14,000 in cash. In reply the agent, on instructions from the plaintiff, wrote to the defendant informing him that the plaintiff accepted the terms and would pay the \$14,000 in cash. On receipt of this letter, the defendant drew up an offer at \$14,000, containing the same terms, but changing the date for acceptance and for closing, and forwarded it for engrossment and for signature by the plaintiff. This was engrossed and then signed by the plaintiff and sent to the defendant, who then wrote to the agent declining to accept it:—

*Held*, in an action for specific performance, that no contract binding upon the defendant could be made out from the documents and correspondence.

*Harvey v. Facey*, [1893] A.C. 552, followed.

Judgment of TEETZEL, J., reversed.

MOTION by the plaintiff for judgment on the pleadings and admissions filed in an action for specific performance of a contract. The facts are stated in the judgments.

The motion was heard by TEETZEL, J., in the Weekly Court at Toronto, on the 26th September, 1906.

*J. A. Paterson*, K.C., for the plaintiff.

*W. E. Middleton*, for the defendant.

November 7. TEETZEL, J.:—The defendant, who resides in California, is the owner of 468 and 470 Yonge street, and 3 Grenville street, Toronto; and I infer from the correspondence had placed this and other property in the hands of H. Graham & Son as agents to collect the rents and to receive offers of purchase and submit the same to the defendant, but they had no authority from him to make sale agreements.

On the 9th December, 1905, Graham & Son received from the plaintiff and forwarded to the defendant a formal written offer for the property, signed by the plaintiff, the price offered being \$14,000,



D. C.  
1906  
BOHAN  
v.  
GALBRAITH.  
Teetzel, J.

payable \$7,000 cash and balance in ten half-yearly payments of \$700 each, with interest at five per cent. A previous offer of \$13,000 on similar terms had been refused.

In reply to the letter enclosing the last offer, the defendant, on the 15th December, 1905, wrote the following letter to Graham & Son:—

“Dear Sirs:—Your offer from Mr. Bohan of \$14,000 for Yonge street is not what I wish to accept; I told you last summer I would not let it go for less than that amount, but I would not care to sell it on payments.

“I have several times told you that I will not have payments on any properties. I might make an exception as to Danforth ave. only.

“You told me money loans would now be six per cent. when I spoke to you about possibility of borrowing to buy more property.

“Therefore, if Mr. Bohan wants the property, he can get his own loan, as suggested in your first letter, and pay me fourteen thousand cash, or I will take a straight mortgage for five years at 6 per cent., payable half-yearly. If he can get it at 5 per cent. himself, he is welcome to do so elsewhere. If he borrows from the same party who had the loan before, his expense would be small and the title searched free of cost. Please consider this final.”

And on the 20th December Graham & Son, with the plaintiff's authority, wrote the following letter to the defendant:—

“Dear Sir:—Your favour of 15th inst. to hand; in reply we beg to inform you that Mr. Bohan accepts the terms named therein and will pay the \$14,000 in cash. We enclose blank deed in duplicate, which you can fill out and forward with instructions how to dispose of proceeds. Kindly forward title papers or inform us where they are to be obtained.

“We are glad to get such a good offer and believe you can, if you wish, reinvest here to good advantage.”

When this letter was received by the defendant, I would infer that he still had in his possession the plaintiff's formal offer of the 9th December, which he altered by making the whole of the purchase money payable in cash on the 1st February, 1906. Said offer had contained these words: “This offer to be accepted by 23rd December, otherwise void, and sale to be completed on or before the first day of January, 1906.” The defendant altered

this language by changing "23rd December" to "15th January" and "January" to "February."

With these alterations the defendant returned the offer to Graham & Son, with the following note written by him at the bottom:—

"Dear Sir:—You forgot to send amended offer from Mr. Bohan. I have returned this for signature when re-written."

On the 3rd January Graham & Son got the plaintiff to sign an engrossed copy of the amended offer, and enclosed the same to the defendant in a letter, stating:—

"Dear Sir:—As you request, we have had amended offer made out and signed by Mr. Bohan, and forward the same for your acceptance. We did not think this necessary, as if title papers had been forwarded Mr. Bohan was ready to pay over the money at any time."

On the 9th January the defendant wrote Graham & Son as follows:—"Dear Sirs:—Yours of the 3rd inst. enclosing amended offer from Mr. Bohan received, and after due consideration I have decided not to accept it. It will not be necessary for me to give my reasons now, as I will be in Toronto in a month or two, and will call on you."

It seems to me that upon the correspondence and papers two principal questions are:—

Does the correspondence down to the letter of the 20th December disclose a complete contract between the parties? (2) Assuming it does, is the defendant entitled to withdraw in consequence of the amended offer of the 9th January, signed by the plaintiff, which contained the words: "This offer to be accepted by 15th January, 1906, otherwise void."

It was strongly argued by Mr. Middleton that the letter of the 15th December was at most only in the nature of a quotation of price and terms, and not an offer the acceptance of which would be binding on the defendant, and he relied upon *Harvey v. Facey*, [1893] A.C. 552, and *Johnston v. Rogers* (1899), 30 O.R. 150, as supporting this contention.

In the first case the plaintiffs telegraphed the defendant: "Will you sell us B.H.P.? Telegraph lowest cash price;" to which the defendant telegraphed in answer: "Lowest price for B.H.P. £900;" and then the plaintiffs telegraphed: "We agree to

D. C.

1906

BOHAN

v.

GALBRAITH.

Teetzel, J.

D. C.  
1906  
BOHAN  
v  
GALBRAITH.  
Teetzel, J.

buy B.H.P. for £900 asked by you. Please send us your title deed in order that we may get early possession;" but received no reply. The Court held that there was no contract, that the defendant's telegraph contained no offer to sell, and was only an answer to the plaintiffs' question as to price, and that the final telegram was an offer to buy, the acceptance of which must be expressed, and could not be implied; and that the mere statement of the lowest price at which the vendor would sell contained no implied contract that he would sell at that price to the person making the inquiry.

In *Johnston v. Rogers* the defendants, dealers in flour, wrote to the plaintiffs, bakers, that they wished to secure their patronage as customers, and quoting prices and terms for specified quantities of flour, adding a suggestion that the plaintiffs should "use the wire to order." The plaintiffs answered by telegram that they would take two cars "at your offer of yesterday." The defendants did not deliver the flour; and the plaintiffs sued for damages, and the Court held that there was no contract, and that the defendants' communication was merely a quotation of prices, which might vary from day to day, and was not an offer to sell at certain prices.

This case is, I think, clearly distinguishable upon the documents from each of the two cases cited, because the letter of the 15th December is, in my opinion, not merely a statement or quotation of price, but conveys an offer to sell to the plaintiff at that price.

The plaintiff had made two offers, which were both refused by the defendant, and it seems to me the only purpose that can be imputed to the letter of the 15th December, was to make clear the defendant's counter-proposal, and the only terms upon which he would sell. It was not a case of merely answering an inquiry as to lowest price, nor making an original quotation, but an individual link in a chain of negotiations leading to an agreement which both parties contemplated would be entered into.

The letter may, in the light of the previous correspondence, be fairly paraphrased thus: "The terms of Mr. Bohan's offer of \$14,000 for the Yonge street property are not what I wish to accept, because, as you know, I will not accept instalment payments on any property; therefore, my final proposal is, that if Mr. Bohan wants the property at that sum, he can have it by arranging his own loan and paying me \$14,000 cash, or I will take a straight mortgage for the half for five years at six per cent. half-yearly."

Upon the first question, therefore, I am of opinion that when the letter of the 20th December was sent the parties had concluded a complete contract of sale and purchase.

Then, does what happened afterwards entitle the defendant to withdraw? I am of opinion that it does not. There was nothing in the correspondence indicating any condition that the plaintiff should sign a further formal offer. He had unconditionally accepted the defendant's terms, which only essentially differed from his offer of the 9th December in regard to the mode of payment, and it was therefore quite unnecessary for the plaintiff to sign a further amended offer.

It is difficult to understand why the defendant should have asked it to be done, except on the assumption that he did not know that the agents' letter of the 20th December was binding upon the plaintiff. In my view, the sending of the amended offer by the plaintiff, after the contract was concluded, was simply a supererogatory act, which did not discharge, alter, or add to the contract already made.

Judgment should, therefore, be entered in favour of the plaintiff for specific performance as prayed in the statement of claim, and costs.

The defendant appealed from this decision, and his appeal was heard by a Divisional Court composed of BOYD, C., MACLAREN, J.A., and MABEE, J., on the 11th January, 1907.

*W. E. Middleton*, for the defendant. First, is there on the correspondence a contract? Second, is there a contract within the Statute of Frauds? *Harvey v. Facey*, [1893] A.C. 552, covers this case. The defendant said he would accept—said so to his agent—but, when the offer came, he did not accept. *Johnston v. Rogers*, 30 O.R. 150, follows *Harvey v. Facey*. See the remarks of Lord Selborne in *Hussey v. Horne-Payne* (1879), 4 App. Cas. 311, 323. This case is very like *Jones v. Daniel*, [1894] 2 Ch. 332. Graham was the defendant's agent to receive offers, not to sell or conclude a contract: *Bradley v. Elliott* (1906), 11 O.L.R. 398; *Rosenbaum v. Belson*, [1900] 2 Ch. 267; *Prior v. Moore* (1887), 3 Times L.R. 624; *Hamer v. Sharp* (1874), L.R. 19 Eq. 108. The defendant's letter was not an offer, but an expression of an intention to accept

D. C.

1906

BOHAN

v.

GALBRAITH.

Testzel, J.



D. C.

1907

BOHAN  
v.  
GALBRAITH.

an offer if made. The terms of sale were never incorporated in any writing signed by the defendant.

*J. A. Paterson*, K.C., for the plaintiff, relied on the reasoning of *Teetzel*, J., and referred to *Harty v. Gooderham* (1871), 31 U.C.R. 18; *Bundy v. Johnson* (1857), 6 C.P. 221; *Clergue v. McKay* (1903), 6 O.L.R. 51; *S.C.*, *sub nom. Clergue v. Preston* (1904), 8 O.L.R. 84; *Rossiter v. Miller* (1878), 3 App. Cas. 1124; *Fry on Specific Performance*, 4th ed., p. 230 *et seq.*; *Filby v. Hounsell*, [1896] 2 Ch. 737, 742; *Schneider v. Norris* (1814), 2 M. & S. 286; *Bradford v. Roulston* (1858), 8 Ir. C.L.R. 468; *Evans v. Hoare*, [1892] 1 Q.B. 593.

January 15. MACLAREN, J.A.:—The defendant, a Toronto solicitor, has been residing for some time in California. He owns some property on Yonge street in the city of Toronto, H. Graham & Son being his agents for the collection of the rents. He was here in the summer of 1905, and discussed the sale of the property, arranging that Graham should send him any offers he might receive. The plaintiff on the 2nd December, 1905, filled up and signed a printed form offering \$13,000, naming terms of payment, and other details. This was sent by Graham to the defendant, who refused it. The plaintiff then signed another offer, dated the 9th December, of \$14,000, on a similar form, half cash, balance payable by instalments, offer to be accepted by the 23rd December, sale to be completed by the 1st January. This was sent by Graham to the defendant, who, on the 15th December, wrote to Graham: "Your offer from Mr. Bohan of \$14,000 for Yonge street is not what I wish to accept. I told you last summer I would not let it go for less than that amount, but I would not care to sell it on payments. . . . Therefore, if Mr. Bohan wants the property, he can get his own loan, as suggested in your first letter, and pay me \$14,000 cash, or I will take a straight mortgage for five years at six per cent., payable half-yearly. If he can get it at five per cent. himself, he is welcome to do so elsewhere. If he borrows from the same party who had the loan before, his expense would be small and the title searched free of expense. Please consider this final."

On the 20th December Graham, on instructions from the plaintiff, wrote the defendant as follows: "Your favour of 15th instant to hand; in reply we beg to inform you that Mr. Bohan accepts the terms named therein, and will pay the \$14,000 in cash. We enclose

blank deed in duplicate, which you can fill out and forward with instructions how to dispose of proceeds. Kindly forward title papers or inform us where they are to be obtained. We are glad to get such a good offer." On receipt of this letter, the defendant took the offer sent him on the 9th December, and altered it to agree with this letter of the 20th December, changing the date for acceptance from the 23rd December to the 1st January, and the date for closing from the 1st January to the 1st February, and sent it to Graham, with this note: "You forgot to send amended offer from Mr. Bohan. I have returned this for signature when re-written."

The offer was re-engrossed in accordance with the defendant's alterations, was dated the 2nd January, 1906, signed by the plaintiff, and sent on the 3rd January by Graham to the defendant with this letter: "As you request, we have had amended offer made out and signed by Mr. Bohan, and forward the same for your acceptance. We did not think this necessary, as if title papers had been forwarded, Mr. Bohan was ready to pay over the money at any time." On the 9th January the defendant wrote Graham declining to accept this offer.

Teetzel, J., who heard the case, was of opinion that the defendant's letter of the 15th December, above quoted, was an offer to sell to the plaintiff for the price named, and this having been unconditionally accepted by the plaintiff in the letter of the 20th December, there was a binding contract, from which the defendant was not entitled to withdraw on account of what took place subsequently.

With great respect, I find myself unable to take this view. The course of dealing between the parties shews that the defendant always intended that the business should be done by way of a formal offer in writing embodying all the terms, and an acceptance; and I do not think that his letter of 15th December can be taken as a waiver or departure from this method of procedure. As a solicitor he would have present to his mind the risk he would run as to title, etc., if he made an open contract such as this would have been, if the claim now put forward by the plaintiff is well founded. No doubt, a contract can sometimes under the Statute of Frauds be spelt out from correspondence, even when a party is not aware that he is making a binding contract. But, as said by Lord Selborne in *Jervis v. Berridge* (1873), L.R. 8 Ch. 351, at p. 360: "The

D. C.  
1907  
BOHAN  
v.  
GALBRAITH.  
Maclaren, J.A.

D.C.  
1907  
BOHAN  
v.  
GALBRAITH.  
—  
Maclaren, J.A.

Statute of Frauds . . . does not make any signed instrument a valid contract by reason of the signature, if it is not such according to the good faith and real intention of the parties." Even if there had been nothing subsequent to the letter of the 20th December, I would have had difficulty in coming to the conclusion that there was then a binding contract. There is in the letter of the 15th December no offer in terms to sell to the plaintiff, and it is not wholly without significance that it was not addressed to the plaintiff, but to the defendant's own agent, and may be looked upon as intended partly to govern the agent as to what kind of an offer he might thereafter submit for the defendant's acceptance. It is also to be observed that the letter of the 20th December itself speaks of its being an "offer" from the plaintiff. The case is, no doubt, near the line; but the weight of authority seems to be on the side of the defendant. In order to succeed the plaintiff must establish his case; I think he has fallen short of this.

The plaintiff's case here does not appear to be so strong as that of the plaintiffs in *Harvey v. Facey*, [1893] A.C. 552. There the appellants telegraphed the respondent: "Will you sell us B.H.P.? Telegraph lowest cash price." The respondent answered: "Lowest price for B.H.P., £900." The appellants telegraphed: "We agree to buy B.H.P. for £900 asked by you. Please send us your title deed in order that we may get early possession." The Privy Council held that there was no contract; that the respondent had not expressly said he would sell to the appellants, and his telegram was not binding on him except as to price, everything else being left open.

I also think that the plaintiff in *Johnston v. Rogers* had a stronger case. There the defendants, flour dealers, wrote to the plaintiffs, who were bakers, soliciting their patronage, quoting prices, and asking the plaintiffs to "use the wire to order." The plaintiffs answered the next day by telegraph, saying they would take two cars of flour "at your offer of yesterday." It was held by a Divisional Court, following *Harvey v. Facey*, that there was no contract: 30 O.R. 150.

But, under the circumstances, I do not think we can properly take the letters of the 15th and 20th December and dissociate them entirely from what took place subsequently. In his written offer of the 2nd January the plaintiff inserted as one of the terms: "This

offer to be accepted by 15th January, otherwise void." It was not so accepted, and consequently by his own proposition it is void. It is the contract which would have been made if this offer of the plaintiff had been accepted which he is now seeking to enforce by his present action. The full terms as contemplated by the parties I do not find elsewhere. Even if there had been a completed contract under the letters of the 15th and 20th December, which I am unable to find, it might be argued that the plaintiff waived it, and re-opened the question. But it is not necessary to go so far, and I prefer to treat the offer of the 2nd January rather as evidence of a recognition by the plaintiff that the defendant was entitled to take the position he had done, and to insist on concluding the negotiations on the line on which they had begun, namely, in the form of a formal offer in writing by the proposed purchaser and an acceptance by the vendor.

For these reasons I am of opinion that the appeal should be allowed and the plaintiff's action dismissed; but, under the circumstances, I do not think there should be any costs either here or in the Court below.

BOYD, C.:—I agree in the result.

MABEE, J.:—I agree.

E. B. B.

D. C.

1907

BOHAN

v.

GALBRAITH.

Maclaren, J.A.



[MAGEE, J.]

1907

CARTER V. HUNTER.

Jan. 11.

Jan. 23.

*Assessment and Taxes—Tax Sale—Invalidity—Lands not Included in List of Lands Liable to Sale—Vague Description in Assessment Rolls—Non-compliance with Assessment Act—Lien for Purchase Money—Lien for Subsequent Taxes—Interest—Rents and Profits—Improvements.*

A sale to the defendant on the 10th April, 1901, and a subsequent conveyance of lots 2 and 3 in block B. on the east side of Gladstone avenue on plan 396, in the city of Toronto, for the arrears of taxes thereon for the years 1893 to 1898, inclusive, were set aside, for the direct breach of sec. 176 of the Assessment Act, R.S.O. 1897, ch. 224, the provisions of which are imperative, by selling in April, 1901, without having either in the preceding January or in January, 1900, which preceded the date of the mayor's warrant, included the two lots in the list of lands liable to sale furnished to the clerk under sec. 152; and also because the description of the lands in the assessment rolls from 1893 to 1898 was too vague and indefinite to be a compliance with the Act: see secs. 13, 29, 34.

The assessments being invalid, the defendant was not entitled to a lien under sec. 218 for the amount of purchase money paid by her, but was entitled to a lien for taxes paid by her for the years 1900 to 1906, inclusive, the assessment for those years being sufficient, and interest thereon, but less the rents and profits derived therefrom, subject to a deduction for repairs, improvements, etc.

*Fenton v. McWain* (1877), 41 U.C.R. 239, and *Wildman v. Tait* (1900-1), 32 O.R. 274, 2 O.L.R. 307, followed.

AN action to set aside a tax sale. The facts are stated in the judgment.

The action was tried before MAGEE, J., without a jury, at Toronto, on the 7th and 18th October, 1904.

*J. A. Worrell*, K.C., and *W. D. Gwynne*, for the plaintiff.

*J. W. St. John* and *W. C. Chisholm*, for the defendant.

January 11, 1907. MAGEE, J.:—The action is to set aside a sale made on the 10th April, 1901, to the defendant for arrears of taxes of lots 2 and 3 in block B. on the east side of Gladstone avenue on plan 396, in the city of Toronto, and the conveyance to her made pursuant thereto, in so far as it affects those two lots. The action was commenced on the 9th April, 1903.

The plaintiff in 1890 became assignee of a mortgage on the land made by one Milne, who in 1890 conveyed to Jesse D. Hannah and James B. Hannah. In June, 1894, the plaintiff obtained a final order of foreclosure against Milne and the Hannahs.

He has since 1890 resided in England and had no domicile or place of business in Toronto, and he did not at any time require the land to be assessed to him. Through his representative in Toronto, he knew in 1894 of the alleged arrears of taxes, and when, in 1898, the land was offered for sale for the taxes of 1893-4-5, at which sale there were no bidders, he knew of it and had a representative present watching the proceedings. The foreclosure order was not registered till 1903, and the city officials would not from the registry books have any information of his ownership. There is nothing to shew that any of them knew who was the owner after 1894. It is not alleged that any of the taxes for 1893 to 1898 were paid.

Block B. is bounded on the north by Cross street and on the south by Argyle street. It has 28 lots facing on the east side of Gladstone avenue. These lots are numbered consecutively from 1 to 28, beginning at the south. Block A., south of block B., has 22 similar lots. Of these 50 lots all but 4 are 25 feet in width, and they gradually vary in length from 122 feet 7 inches at the south of block A. to 113 feet 6 inches at the north of block B. Lots 2 and 3 in block B. are each 25 feet wide, and grade in length from 117 feet 10 inches to 117 feet 6 inches.

On the west end of lot 1 in block B., at the corner of Argyle street and Gladstone avenue, there was in 1893 and subsequent years a small brick shop known as No. 91 Gladstone avenue. It extended up to the southern boundary of lot 2. At the east end of lot 1 was a frame building used as a workshop or stable, which extended into lot 2 northerly about 20 feet. A fence ran from the brick shop to the stable along the boundary between lots 1 and 2. There was no fence between lots 2 and 3. Between lots 3 and 4 there was a fence, and on lot 4, about 7 feet from that fence, there was a dwelling-house known as No. 97 Gladstone avenue. Excepting the part of the frame stable on lot 2, there were no buildings on that lot or lot 3.

The sale to the defendant was made for the arrears of taxes for the years 1893 to 1898, inclusive.

The assessment roll prepared in 1892, and finally revised on the 19th December of that year, was used as the basis of taxation for 1893, and is called the assessment roll for 1893. In the consecutive assessment numbers it has after No. 989 the heading

Magee, J.

1907

CARTER

v.

HUNTER.

Magee, J.

1907

CARTER

v.

HUNTER.

"Gladstone avenue east side commencing at Queen street," and then follow assessments numbers 990 to 1041 of various properties, having in the column headed "street or lot No." odd numbers from 5 up to 89, and then an entry "Argyle street intersects," and then as follows:—

No.	Occupant.	Owner.	Street or lot No.	Size of lot.	Value of land.	Value of build- ings.	Value of each par- cel.	Time of serv- ing notice.
1042	Wm. Wesley...	JesseD.Hannah JamesB.Hannah	91	25 x 118	825	200	1025	Sept. 21
1043	Hannah, Jesse D....	JesseD.Hannah ..		25 x 117	750	300	1050	Sept. 21
1044	Vacant lot....	JamesB.Hannah JesseD.Hannah ..		25 x 117	750	....	750	"
1045	Kelly, William H..	WilliamH.Kelly	97	25 x 117	750	1700	2450	"

Then follow assessments numbers 1046 to 1059 of various properties having under "street or lot No." successive numbers 99 to 115, and then assessment numbers 1060 to 1074 for a number of properties all marked under "occupant" "vacant lot" and having under "owner" one person's name, and under "street or lot No." successive numbers 14 to 28, these being marked "plan D. 287." Then comes the entry "Cross street intersects."

There is nothing on the roll to shew which are street numbers and which are lot numbers, but one may surmise that the assessor was entering the properties in regular order from the south to the north, and that from No. 990 to 1059 he entered the street numbers, and thence to No. 1074 the lot numbers. Apart from this assumption, there is nothing to shew the locality of the property assessed under Nos. 1043 and 1044 to Messrs. Hannah. The locality of lots 14 to 28 on plan D. 287 is not shewn. Probably they are the same as on plan 396, but there is no evidence on the subject.

In the assessment roll for 1894, finally revised on the 15th December, 1893, the same system appears to be pursued, and under the heading "Gladstone avenue east side continued," and after the words "Argyle street intersects," the entries are as follows:—

No.	Occupant.	Owner.	Street or lot No.	Size of lot.	Value of land.	Value of build- ings.	Value of each par- cel.	Time of serv- ing notice
1051	Ryan, Thomas.	C. W. Lang....	91	25 x 118	825	200	1025	Sept. 14
1052	Vacant shop...	C. W. Lang....		25 x 117 <sup>6</sup>	750	300	1050	.....
1053	Vacant lot....	C. W. Lang....		25 x 117 <sup>6</sup>	750	....	750	.....
1054	Shouldice, J. W.....	J.W.Shouldice.	97	25 x 117 <sup>6</sup>	750	1700	....	Sept. 14

Then follow other assessments, having under "street or lot No." 99 up to 115, and then 14 to 28 plan D. 287, as in 1893. It does not appear that any one named Lang ever had anything to do with these lots 2 and 3.

The assessment roll for 1895, which was finally revised on the 29th December, 1894, is in all respects similar, the first four entries after "Argyle street intersects" being as follows:—

No.	Occupant.	Owner.	Street or lot No.	Size of lot.	Value of land.	Value of build- ings.	Time of serv- ing notice.
1032	Ryan, Thomas....	T. W. Laing .....	91	25 x 118	825	400	Sept. 11
1033	Workshop.....	unknown.....	..	25 x 117	750	150	.....
1034	Vacant lot.....	unknown.....	..	25 x 117	750	.....	.....
1035	Shouldice, J. W....	J. W. Shouldice...	97	25 x 117	750	1700	"

In the assessment roll for 1896, finally revised on the 11th December, 1895, which is in all respects similar to that for 1895, these first four entries are as follows:—

No.	Occupant.	Owner.	Street or lot No.	Size of lot.	Value of land.	Value of build- ings.	Time of serv- ing notice.
1096	Ryan, Thomas....	T. W. Lang .....	91	25 x 118	825	400	Sept. 11
1097	Vacant shop.....	unknown.....	..	25 x 117 <sup>6</sup>	750	150	.....
1098	Vacant lot.....	unknown.....	..	25 x 117 <sup>6</sup>	750	.....	.....
1099	Shouldice, J. W....	J. W. Shouldice...	97	25 x 117	750	1550	Sept. 11

In the assessment roll for 1897, finally revised on the 12th August, 1896, and likewise similar to that for 1895, these first four entries are:—

No.	Occupant.	Owner.	Street or lot No.	Size of lot.	Value of land.	Value of build- ings.	Time of serv- ing notice.
1048	Thomas Ryan....	J. W. Lang .....	91	25 x 118	625	400	July 7
1049	Vacant lot and barn.....	unknown.....	..	25 x 117 <sup>6</sup>	450	50	"
1050	Vacant lot.....	unknown.....	..	25 x 117 <sup>6</sup>	450	.....	"
1051	John W. Shouldice.	John W. Shouldice.	97	25 x 117 <sup>6</sup>	450	1500	"

The assessment roll for 1898, finally revised on the 6th August, 1897, is also similar, and these first four entries are the same as in 1897 except that the roll numbers are 1035-6-7-8 and the "time of serving notice" is "June 28."

The collectors' rolls for these years 1893-4-5-6-7-8 have respectively the same particulars as in the assessments rolls under the headings of "Assessment No.," "Occupant," "Owner," "Street

Magee, J.

1907

CARTER  
v.

HUNTER.



Magee, J.

1907

CARTER

v.

HUNTER.

or lot No.," and the same total "value of real property," but in 1893-4-5-6, instead of "size of lot," only the "feet frontage" is stated, being 25 feet for each of the two parcels assumed to represent the lots in question. In 1897 and 1898 the size of lot is given as in the assessment rolls for those years. The column in these collectors' rolls headed "date of demand of taxes" has no entry opposite these two parcels in 1893 or 1894, and in 1895 has "Jul. 8" and in 1896 "Jul. 17," and in 1897 "Jul. 16," and in 1898 "Aug. 2."

The collectors' returns to these various rolls as to these two parcels shew under "Reasons for non-payment" in 1893 "Vacant lot—no goods," and in 1894 "nothing to distrain," and in 1895 "nothing to distrain," and also to the first parcel "vacant," and in 1896-7-8 "not sufficient to distrain."

It is stated by the treasurer, though his means of knowledge are not shewn, that a duplicate of these returns shewing uncollected taxes was not furnished to the clerk by the collector, as required by sec. 147 up till 61 Vict. ch. 25, sec. 2, for the years 1893, 1894, and 1896. All these returns were made after the plaintiff had obtained the foreclosure order. As the only object of giving a duplicate to the clerk apparently would be that he should notify the persons appearing on the roll, it is very questionable if notice to Lang or Hannah would have been of any value to the plaintiff.

A list headed "List of lands in Ward No. 6, Division No. 2, in the City of Toronto, liable to be sold for arrears of taxes in the year 1897," and dated the 10th September, 1896, was received by the city clerk from the treasurer on the 11th September, 1896.

This list gives "locality" "Gladstone ave. east side," "names of owners assessed" "J. W. Lang," "years in arrears" "1893-4-5," and under the head of "property" states "last registered assessment No." "1034" and "1033," "Size of lot" "25 x 117," and "description" as to No. 1034, "Lot bounded north by house No. 97," and as to No. 1033, "Lot bounded south by No. 91, north of Argyle street."

The assessor's return to this list states the property as "un-occupied" "assessment No." "1050" and "1049" "Owner" "Unknown," and under the head of "General remarks" states as to No. 1034 "Vacant lot 25 x 117.6," and as to No. 1033 "vacant lot 25 x 117." Upon the return is entered, "All notices transmitted or delivered November 11th, 1896;" but I take it this does not refer

to these parcels. To it is appended a certificate by F. B. Morrow, assessor in 1896, sworn to before the city clerk on the 12th November, 1896, in the form required by sec. 154 (then sec. 142 of the Consolidated Assessment Act, 1892), as to having examined all the lots and entered the names of occupants and of owners when known and of truth of entries.

It appears that the clerk did not, as to this list of the treasurer, comply with sec. 153, for the clerk did not make a copy for the assessor, nor make and send to the treasurer a copy of the assessor's return, nor keep the original list and return on file in his office. Instead, the original list was used for all three officers, the assessor's entries and certificate being made on the treasurer's original list, which was sent back to the latter.

Again in January, 1899, the treasurer sent the clerk a "list of lands in ward No. 6, division No. 2, in the city of Toronto, liable to be sold for arrears of taxes in the year 1900," which was received at the clerk's office on the 30th January, 1899.

In it the entries in question are:—

Locality.	Name of owner assessed.	Years in arrears.	Last registered in assessment No.	Property Size of lot.	Description.
GladstoneAve.East	JamesB.Hannah. JesseD.Hannah..	1893			
	J. W. Lang.....	1894	1034	25 x 117	Lot bounded northerly by house No. 97.
	Unknown.....	1895			
GladstoneAve.East	Jesse D.Hannah..	1893			
	J. W. Lang.....	1894	1033	25 x 117	Lot with house thereon.
	Unknown.....	1895			

The list makes no mention of arrears for 1896, 1897, or 1898. The assessor's return to this list states the property as "not occupied" Assessment Nos. "69067" and "69066," names of owners, "James B. Hannah, Jesse D. Hannah," and under "present state of property" reports the first parcel as "south of house No. 97, lot 3 plan 396, 25 x 117.6," and the second parcel as "north of house No. 91, 25 x 117.6," and there is an entry opposite each parcel "1899 July 3rd, parties notified."

On this return is a certificate signed by four assessors, and sworn to on the 6th July, 1899. The certificate states that "we have examined all the lots in this list named which have been

Magee, J.

1907

CARTER

v.

HUNTER.

Magee, J.

1907

CARTER

v.

HUNTER.

assessed by us for the year 1900," and proceeds otherwise according to the form in sec. 154. It is marked as received at the clerk's office on the 6th July, 1899.

There is no direct evidence as to whether the clerk in any year after receiving the treasurer's list of September, 1896, or that of January, 1899, examined the assessment roll, as required by sec. 155, to see if any of the land on the list was entered as occupied, or, after 62 Vict. (2) ch. 27, sec. 11, built on. The latter Act came into force on the 1st May, 1899. The assessment roll, if returned by the assessor along with his report on the treasurer's list of January, 1899, would be received by the clerk on the 6th July, 1899, and could therefore be examined by him. Section 13 of the Assessment Act (column 11) requires the assessor to state whether the land is vacant or built on. There was a building on lot 2, and presumably the roll would shew that fact, as did the roll for 1897 and 1898. Yet it is admitted that the arrears on neither of these two lots were put on the collector's roll of 1900 for collection under sec. 155. That this may have worked a real prejudice to the plaintiff as to lot 2 is shewn by the fact that the defendant's husband after her deed found a man in occupation of the stable, who claimed title to it by length of possession.

In September, 1900, the treasurer sent to the clerk a list of lands "liable to be sold for taxes in 1901," and in January, 1901, he sent the clerk a list of lands "liable to be sold for taxes in 1902;" but neither of these two lists made any reference to either of these two parcels.

In December, 1900, the treasurer received the warrant of the mayor to sell the lands in the list annexed to it, which the treasurer had submitted to him.

The two assessed parcels referred to were therein described respectively as "lot 25 x 117 bounded southerly by house No. 91, east side of Gladstone avenue north of Argyle street," and "lot 25 x 117 east side of Gladstone avenue, bounded northerly by house No. 97."

It is admitted that due publication was made of the advertisement of sale. The defendant was the purchaser of each of the two lots, and obtained the treasurer's certificate of sale. In those certificates the two parcels alleged to have been sold are described as in the list annexed to the warrant.

The deed to the defendant is dated the 23rd April, 1902, and correctly describes lots 2 and 3 in question, making no reference to the descriptions in the warrant. It includes, as permitted by sec. 201, two other parcels which the defendant had bought at the same sale, but it only mentions one sum as the consideration paid for all; as to which see sec. 203. The deed was registered on the 7th May, 1902.

The defendant subsequently received rents and profits and paid taxes and made outlay for repairs, etc., and paid a small sum to the man who occupied the stable to get possession.

It is contended for the plaintiff that his land should, under secs. 3, 22, 34, and 132 of the Assessment Act, R.S.O. 1897, ch. 224, have been treated as "lands of non-residents," and separately entered on the assessment roll as such, and entered on the non-resident roll of taxes instead of the collector's roll. It is not shewn or alleged that any prejudice resulted to him from this not being done. The course adopted was more likely to be beneficial to him.

It was not questioned, though not admitted or proved, that the city corporation had passed by-laws under sec. 59 for taking the assessments at a later time (before the 30th September) than in ordinary municipalities as under secs. 55, 56, 75, and if so the assessment might be adopted by the council of the following year as the basis of taxation. But, even if so, that does not under the Act affect the prescribed order or dates for later steps in the process of rate-collecting—such as the delivery of the tax rolls (secs. 131, 132), the collector's return (secs. 146, 147, and 61 Vict. ch. 25, sec. 2), or the furnishing by the treasurer to the clerk, on or before the 1st February, of the list of lands liable to sale. This last mentioned list is to be headed "List of lands liable to be sold for arrears of taxes in the year 18—" meaning evidently the year of its delivery.

The system under sec. 59 has caused some confusion. The assessment roll of one year is called the roll for the succeeding year, even before it is adopted by the council, and it was perhaps owing to the later assessment that the treasurer delivered his list in September, 1896, instead of January. He intitled it "List of lands, etc., liable to be sold in the year 1897," and the list given in January, 1899, is headed "List of lands, etc., liable to be sold in the year 1900."

It is to be noticed that the treasurer is to furnish the clerk,

Magee, J.

1907

CARTER

v.

HUNTER.



Magee, J.

1907

CARTER

v.

HUNTER.

under sec. 152, with a list on or before the 1st February "in every year," and it is to include lands on which "taxes have been in arrear for the three years next preceding the 1st day of January in any year." Originally (by 32 Vict. ch. 36, sec. 100, from 27 Vict. ch. 19, sec. 1), the words were "for three years preceding," and the present words, "the three years next preceding," first appear in R.S.O. 1877, ch. 180, sec. 108, although not in the previous amending Act, 40 Vict. ch. 77, sch. A. (192).

The intention evidently was and is that the land should be included in the list if even one year's taxes be in arrear for three years, and not that the taxes for "the three years next preceding" must be in arrear. Section 173 directs a sale whenever a portion of the tax has been due "for and in the third year or for more than three years preceding the current year."

Section 176 prevents the treasurer from selling lands which have not been included in the list furnished "in the month of January preceding the sale," or, as the section originally stood (27 Vict. ch. 19, sec. 5), "in the month of January of the year in which" the warrant issued, which became (29 & 30 Vict. ch. 53, sec. 132) "in the month of February preceding the sale."

By 62 Vict. (2) ch. 27, sec. 13, which came in force on the 1st May, 1899, the treasurer is empowered to add to the taxes shewn in the list furnished to the clerk under sec. 152 any taxes subsequently fallen due and returned by the collector as uncollected, and to proceed to sell as if such subsequent taxes had been included in the statement. This provision is not carefully drawn, for the statement under sec. 152 need not shew what taxes are due. In fact, however, here the list of January, 1899, erroneously stated the "years in arrear" as being 1893-4-5, whereas the taxes for 1896 and 1897 the treasurer then knew to be unpaid, if not those of 1898. At the time of the list furnished to the mayor and his warrant to sell, there would be the taxes for 1898 and 1899 also due—but it is not shewn that they were returned as uncollected. The treasurer sold only for the taxes of 1893 to 1899 inclusive—thus leaving the land charged with the taxes for 1899 and 1900—about \$63, which the defendant claims to have since paid. In the amount for which each lot was sold a small sum was included as the expenses of the abortive sale of 1898.

The most salient objection to the tax sale is the direct breach

of sec. 176 by selling in April, 1901, without having either in the preceding January or in January, 1900, which preceded the date of the mayor's warrant, included the lands in the list of lands liable to sale furnished to the clerk under sec. 152. They were omitted from the lists furnished in January, 1901, and September, 1900, and had not been included in any list more recent than January, 1899, nor in any lists but that one and that of September, 1896. The provision of sec. 176 is express.

In *Fenton v. McWain* (1877), 41 U.C.R. 239, this provision was dealt with and its importance pointed out, and at p. 247 it is said: "Then can the treasurer sell any land which should have been on such list, when the statute says he shall not? I think he cannot. If there had been such a list, and this land had not been on it, I should say he could not sell it, and certainly he cannot be entitled to sell it when there is no such list at all." There the tax sale was held invalid on that ground.

I need not refer to the numerous cases which have held the provisions relative to delivery of this list to be imperative. This sec. 176 is not less so than the others, and a sale in disobedience to it cannot be upheld.

The description of the land in the assessment rolls from 1893 to 1898 is too vague and indefinite to be a compliance with the Act. Section 13 requires the assessor to enter the "description and extent or amount of property," and as to land of non-residents sec. 34 is even more specific, and the form of the assessment roll, sec. 13, calls for the number of the lot, house, etc., and see also sec. 29 as to vacant ground. Neither street number nor lot number is given. It is only upon the assumption that the assessor was entering every parcel of land on the east side of Gladstone avenue throughout its entire length, in exact regular order from south to north, that one can presume to locate the parcels which are said to represent these lots 2 and 3. There is nothing in the Act requiring the assessor so to proceed, and no reason beyond probability for making such an assumption. We can assume that the parcels were on the east side of Gladstone avenue, but beyond that nothing. For all that the roll shews, they may be parcels half a mile distant on the same avenue. Even the size of the lots is not a guide, for it is not exact, and there are 44 other lots within two blocks A. and B. alone of practically the same dimensions. As between the two

Magee, J.

1907

CARTER

v.

HUNTER.

Magee, J.

1907

CARTER

v.

HUNTER.

lots themselves there is only the mention of the building to indicate on which the larger amount of taxes was due. It is only in the treasurer's lists of September, 1896, and January, 1899, that an attempt is made to be more specific by describing one parcel as south of No. 97 and the other (in the 1899 list) as north of No. 91. These descriptions are adhered to in the advertisement and in the certificate of sale. There is nothing in the assessment rolls to distinguish between house or street numbers and lot numbers.

The assessment roll is the basis of all subsequent proceedings, and, if it is too uncertain for the Court to ascertain where the land is, the treasurer cannot by making a guess, however good, make valid the subsequent proceedings which owe their existence to the roll itself. We cannot expect nicety and precision in such matters and on such a document, but there should be at least substantial certainty.

In *Wildman v. Tait* (1900), 32 O.R. 274, affirmed on this question in (1901) 2 O.L.R. 307, an assessment in 1890 and 1891 of a parcel described as "Occupant—water lot" "Owner—John Maughan," "Size of lot—436 x 660," was held "clearly invalid." I am unable satisfactorily to distinguish the present case from that one on this question, though there were other objections there. Here all the assessments, 1893 to 1898 inclusive, are equally defective.

Upon these two grounds of disregard of sec. 176, and insufficiency of description in assessment, I find the sale to have been invalid and the deed to the defendant, so far only as relates to these two lots, to be also invalid. Other grounds were urged, but it is not necessary to deal with them.

The assessments being invalid, it follows from the decision of the Divisional Court in *Wildman v. Tait*, 2 O.L.R. 307, that the defendant cannot claim a lien on the land under sec. 218 for the amount of purchase money paid by her. She claims to have paid taxes for the years since 1898. No evidence was offered as to the mode of assessment after that year. As to any years in which the property was sufficiently assessed, she will have a lien upon each lot for the taxes paid thereon, and interest as under sec. 218, less the rents and profits derived therefrom, out of which, however, she should be allowed to deduct her outlay for repairs and improvements, including fencing and the partition in stable, and also the amount paid to Thompson for possession of the building on lot 2.



If the parties differ as to the amount of the lien, there will be a reference to the Master. If they so desire, the reference may include an inquiry as to mesne profits, with authority to the Master to direct payment, the pleadings in such case being amended in that respect. Otherwise mesne profits are not dealt with except in so far as they may reduce the lien, and this judgment is not to prejudice any claim of the plaintiff therefor. If the parties so desire, they may submit to me the assessments for the years after 1898, and I will decide as to the lien therefor, and they can then probably come to a conclusion whether such lien would be exceeded by the rents and profits.

The plaintiff will have the costs up to judgment. The costs of the reference, if any, will be disposed of by the Master.

January 23. *MAGEE, J.*:—Copies of the assessments rolls for the years 1899 to 1906, inclusive, have been submitted to me. The assessment for the year 1899 is no more definite than those for the previous years which I have held invalid. Those for the years 1900 and 1901 have, in addition, the numbers of the lots, 2 and 3, but not stating in which block. I have no evidence that there are more than two sets of lots on the east side of Gladstone avenue having these numbers 2 and 3. It is conceded that proof can be given that lots 2 and 3 in block A. are assessed elsewhere on these rolls for 1900 and 1901. On the principle then adopted in *MacLellan v. Hooey* (1902), 1 O.W.R. 707, there is a sufficient distinction on the face of the assessment roll between the lots 2 and 3 in block A. and those in block B., apart even from the names of the persons assessed—in this case James B. Hannah and Jesse D. Hannah—and I consider the assessment, upon the evidence, sufficient.

The assessments for 1902 and subsequent years are unobjectionable, as they give the numbers of the lots and the block and plan.

The defendant will, therefore, have a lien for the amounts paid by her for the taxes for the years 1900 to 1906, both inclusive—but not for the year 1899.

*Magee, J.*

1907

*CARTER*

*v.*

*HUNTER.*



## [DIVISIONAL COURT.]

D. C.

1907

Jan. 18.

STILL V. HASTINGS.

*Malicious Prosecution—Absence of Reasonable and Probable Cause—Functions of Judge and Jury—Disputed Facts—Nonsuit—New Trial—Judicature Act, sec. 112—Questions for Jury.*

In an action for malicious prosecution the jury is to find the facts on which the question of reasonable and probable cause depends, but the Judge must determine whether the facts found do constitute reasonable and probable cause. The difficulty is in the determination of the question whether there are any facts in dispute upon which the jury should be asked to pass. In determining that the plaintiff has failed to shew absence of reasonable and probable cause, and withdrawing the case entirely from the jury, the Judge must assume in favour of the plaintiff all facts of which he has adduced any reasonable evidence.

Therefore, where the defendant had prosecuted the plaintiff for the theft of some lumber, and the plaintiff admitted taking the lumber, but swore that he had done so with the defendant's consent, in exchange for lumber of his own:—

*Held*, that it must be assumed that the exchange was actually made, and belief of the defendant, when laying the information, in the guilt of the plaintiff, necessarily implied his having forgotten that he had made such an exchange, and such forgetfulness not being admitted, was a question of fact for the jury, and so too the existence in the mind of the defendant of an honest belief in the plaintiff's guilt.

The plaintiff admitted that the defendant, before laying information, charged him orally with the theft of the lumber, and that he (the plaintiff) made no answer to the charge, no allusion to the exchange:—

*Held*, that these facts did not warrant an assumption by the trial Judge that the plaintiff's evidence as to the exchange was untrue, or his drawing an inference that, if any such exchange had in fact taken place, it had passed entirely from the defendant's mind.

Judgment of Mabee, J., nonsuiting the plaintiff set aside, and a new trial directed.

*Semble*, per ANGLIN, J., that sec. 112 of the Judicature Act expressly prohibits the putting of questions to the jury in actions of this kind and of the other kinds specified therein. Suggestion of an amendment of this section.

AN appeal by the plaintiff from the judgment of Mabee, J., at the trial, withdrawing the case from the jury and dismissing the action, which was for malicious prosecution. The plaintiff was prosecuted by the defendant for the theft of some oak lumber, and was acquitted. The plaintiff was the owner of a sawmill, and the defendant a lumber dealer. Evidence was given to the effect that the plaintiff took the defendant's lumber from the latter's yard by his permission, in the carrying out of a bargain for an exchange. The trial Judge ruled that there were no facts in dispute requiring determination by a jury, and that upon the undisputed facts the plaintiff had failed to establish a want of reasonable and probable cause. The facts are more fully stated in the judgments.

The appeal was heard by a Divisional Court composed of MULOCK, C.J. Ex.D., ANGLIN and CLUTE, JJ., on the 14th November, 1906.

*D. O'Connell*, for the plaintiff. There was a negotiation for an exchange of lumber. The jury should have been asked whether or not lumber was or was not as a matter of fact exchanged by the parties. The Judge should not have ruled that want of reasonable and probable cause was not shewn, but should have left it to the jury. I refer to *Young v. Nichol* (1885), 9 O.R. 347; *Hamilton v. Cousineau* (1892), 19 A.R. 203, 221; *Burns v. Clark* (1900), 37 C.L.J. 32; *Davis v. Hardy* (1827), 6 B. & C. 225; *Hicks v. Faulkner* (1878), 8 Q.B.D. 167; *Turner v. Ambler* (1847), 10 Q.B. 252.

*R. McKay*, for the defendant. The plaintiff must prove that there was not reasonable and probable cause—not that there may not have been. The question depends upon the state of the defendant's mind. The evidence is all one way about that, *i.e.*, the evidence taken by the magistrate. The defendant was not called at the trial of this action. The inference as to reasonable and probable cause is to be drawn from all the facts taken together. I rely on *Archibald v. McLaren* (1892), 21 S.C.R. 588; *Lister v. Perryman* (1870), L.R. 4 H.L. 521; *Abrath v. North Eastern R.W. Co.* (1883-6), 11 Q.B.D. 440, 11 App. Cas. 247, 252; *Donnelly v. Bawden* (1877), 40 U.C.R. 611. The inference of the trial Judge that there was ample evidence of the existence of reasonable and probable cause should be upheld.

*O'Connell*, in reply.

January 18. ANGLIN, J.:—This appeal raises once more the always difficult question of the respective functions of Judge and jury in determining whether or not the defendant, sued for malicious prosecution, had reasonable and probable cause for instituting criminal proceedings against the plaintiff. The facts are very fully stated in the judgment of my brother Clute, which I have had the advantage of perusing.

Since *Lister v. Perryman* was decided in 1870, L.R. 4 H.L. 521, it has never been questioned that "the jury must find the facts on which the question of reasonable and probable cause depends, but that the Judge must then determine whether the facts found do constitute reasonable and probable cause." The difficulty generally experienced in the application of this rule, so easily stated, is in

D. C.

1907

STILL

v.

HASTINGS.

D. C.

1907

STILL

v.

HASTINGS.

Anglin, J.

the determination of the question whether there are any facts in dispute upon which the jury should be asked to pass.

In determining that the plaintiff has failed to shew absence of reasonable and probable cause and withdrawing the case entirely from the jury, the Judge must assume in favour of the plaintiff all facts of which he has adduced any reasonable evidence. It must in this case, therefore, be assumed that a quantity of oak lumber, which the plaintiff was charged with having stolen, had, prior to the alleged theft, become his own property as a result of an exchange made with the defendant.

It is perfectly clear that an absence of honest belief on the part of the prosecutor, in the guilt of the accused, negatives the existence of reasonable and probable cause. In the present case assuming (as we must) that the exchange sworn to by the plaintiff was actually made, belief of the defendant in the guilt of the plaintiff, when laying the information, necessarily implies his having forgotten that he had made such an exchange. Such forgetfulness is not admitted. It is somewhat improbable. It certainly cannot be assumed in the defendant's favour. It is a question of fact for the jury, and, in these circumstances, the existence in the mind of the defendant of an honest belief in the plaintiff's guilt, must, I think, also be deemed a question of fact upon which the jury must necessarily be asked to pass.

That this question is not always for the jury is made clear by the decision in *Archibald v. McLaren*, 21 S.C.R. 588, where, there being nothing to suggest want of belief by the defendant in the truth of the information upon which he acted in instituting criminal proceedings against the plaintiff, it was held by the Supreme Court of Canada that the trial Judge had properly assumed such belief to exist and had thereupon rightly nonsuited, on the ground that absence of reasonable and probable cause was not shewn.

In *Young v. Nichol*, 9 O.R. 347, where the defendant's belief in the plaintiff's guilt depended upon his having forgotten that a certain bill or account had not been sent to the plaintiff, the trial Judge having withdrawn the case from the jury, holding that the plaintiff had not proven want of reasonable and probable cause, a Divisional Court ordered a new trial, on the ground that it was necessary that there should be findings of a jury on the questions: first, whether the account had been sent to the plaintiff; . . . third,



if not sent, did the defendant believe it had been so sent; and fourth, if the defendant did so believe, were the circumstances such as to warrant a reasonable man of ordinary prudence to form such belief. Cameron, C.J., at p. 359, quotes with approval the following passage from *Hicks v. Faulkner*, 8 Q.B.D. 167, at p. 171: "The belief of the accuser in the guilt of the accused; his belief in the existence of the facts on which he acted, and the reasonableness of such last-mentioned belief, are questions of fact for the jury, whose findings upon them become so many facts from which the Judge is to draw the inference, and determine whether they do or do not amount to reasonable and probable cause."

The plaintiff admits that the defendant, before laying information, charged him orally with the theft of the oak lumber in question, and that he made no answer to the charge—no allusion to the exchange. These facts did not, I think, warrant an assumption by the learned trial Judge that the plaintiff's evidence as to the exchange was untrue, or his drawing an inference that, if any such exchange had in fact taken place, it had passed entirely from the defendant's mind. The judgment indicates that he drew and acted on both these conclusions upon questions of which only the jury, I think with great respect, was competent to dispose. Facts upon which the inference of reasonable and probable cause depends were, as I have indicated, clearly in dispute, and were necessarily subject to the findings of a jury. The appeal must therefore be allowed and a new trial directed. Costs of the appeal and of the former trial should be to the plaintiff in any event.

I desire again to direct attention to the provisions of sec. 112 of the Judicature Act: "Upon a trial by jury, in any case except an action of libel, slander, criminal conversation, seduction, malicious arrest, malicious prosecution, or false imprisonment, the Judge, instead of directing the jury to give either a general or a special verdict, may direct the jury to answer any questions of fact stated to them by the Judge for the purpose." I read this section as tantamount to an express prohibition against the putting of questions to a jury in actions of the classes enumerated. Notwithstanding its provisions, however, appellate Courts have affirmed the propriety of submitting questions to the jury in actions for malicious prosecution, and in reviewing cases in which questions have been put they have expressed no disapproval of that course.

D. C.  
1907  
STILL  
v.  
HASTINGS.  
—  
Anglin, J.



D. C.  
1907  
STILL  
v.  
HASTINGS.  
Anglin, J.

See *Archibald v. McLaren*, 21 S.C.R. 588, 592; *Malcolm v. Perth Mutual Fire Insurance Co.* (1898), 29 O.R. 406; *Young v. Nichol*, 9 O.R. 347; *Hamilton v. Cousineau*, 19 A.R. 203.

Every trial Judge who has dealt with actions for malicious prosecution must have realized to what embarrassment inability to put questions to the jury in such cases gives rise. It is often practically impossible to direct a jury hypothetically as to the facts upon which reasonable and probable cause depends in such a manner that there can be any certainty that the jury at all appreciates the nature and the scope of its duties in regard to the matters involved in this issue, or any assurance that, in pronouncing a general verdict, the jury will confine itself to the consideration of matters legitimately the subject of its findings. I would, therefore, suggest the advisability of eliminating from the exceptions in sec. 112 of the Judicature Act actions for malicious prosecution.

CLUTE, J.:—The action is one for malicious prosecution. The learned trial Judge, upon hearing the evidence offered on behalf of the plaintiff, held that there were no facts in dispute requiring determination by a jury, and that upon the undisputed facts the plaintiff had failed to establish a want of reasonable and probable cause.

After a careful consideration of the evidence, I am unable to say that there was no evidence which ought to have been submitted to the jury upon the question of reasonable and probable cause.

The plaintiff is the owner of a saw-mill, carrying on business at Burk's Falls; the defendant is a lumber dealer. The defendant was the owner of certain beech, oak, ash, basswood, and elm timber, which the plaintiff agreed to draw to his mill and saw into lumber and to load the said lumber on board the cars as and when instructed by the defendant. There are other terms of the agreement which it is not necessary to refer to. This agreement was dated the 24th December, 1904. The logs were drawn by the plaintiff to his mill yard, sawn into lumber, and placed into piles in his yard.

In February or the fore part of March, 1905, the plaintiff made a bargain with one Smith for 750 ft. of oak. To fill this contract he purchased logs from one Still, brought the same to his mill in June, and sawed the logs into lumber. In order to complete the

order for Smith of the sized oak called for by the contract, he swears that he made an exchange with the defendant, giving the defendant his oak and taking from the defendant the oak of the proper size to fill the contract. As I regard this exchange as the most important point in the case I quote from the evidence.

"Q. Then in the latter part of June he came to your place, and what occurred between you? A. He was looking over the lumber. . . .

"Q. What was done? A. Well, we—— I had some oak that I cut for Mr. Smith, the blacksmith, and I had part of it which was thin stuff, and I wanted to exchange with Mr. Hastings for some heavy stuff he had, and we looked over the oak and he said it was satisfactory, we could make the exchange. . . .

"Q. Now, will you kindly state the conversation that occurred between you and Hastings in regard to that exchange? A. I asked him about that exchange, if he would take this thin lumber for his heavy stuff, and he looked over it and he said he would.

"Q. Did you tell him what you wanted it for? A. Yes, I told him I wanted it for Mr. Smith, the blacksmith.

"Q. He looked over what? A. He looked over what I wanted and what I was giving him.

"Q. And after he had done that, what was said between you? A. He said that would be satisfactory, I could take this.

"Q. He said it would be satisfactory, and you could take it? A. Yes.

"Q. Now, what else occurred on that day? A. We pulled out a couple of planks that was laid at the side of another pile, what they had, and one of them was not very good, it was wormy, and he said, you can take that one too.

"Q. Off of his? A. Yes."

This exchange having been made, the plaintiff delivered to Mr. Smith, in the latter part of June or the early part of July, the oak to fill the contract. The plaintiff further stated in his evidence that he took of the defendant's oak, by way of exchange, 160 ft. for Smith. Matters were in this condition when the defendant came to the plaintiff, on the 5th November, and insisted upon the delivery of the balance of his lumber. The plaintiff's statement of what took place is as follows:—

D. C.  
1907  
STILL  
v.  
HASTINGS.  
Clute, J.

D. C.  
1907  
STILL  
v.  
HASTINGS.  
Clute, J.

"Q. When did you next hear from him? A. He came to the mill a few days after that, him and Mr. Chalmers, with a team to start drawing. . . .

"Q. In October? A. In October.

"Q. What took place between you? A. After he had the load on he wanted to know if I was going to draw any lumber, and I said, 'I am busy, if you have teams I have no objection to your drawing it. I could help you in a few days.'

"Q. Tell me the whole story? A. He wanted me to go right away. He said I was backing out of the contract.

"Q. He said you were backing out of the contract, and wanted you to go at it right away? A. Yes.

"Q. And what else? A. We had some words about backing out of the contract.

"Q. Yes? A. And he was accusing me of not doing what was right with him.

"Q. He accused you of not doing what was right with him? A. Yes.

"Q. What did he say? A. He said I had been backing out of the contract all along, the whole of it, and he was throwing out about my backing out of the contract in the first place of drawing the logs. I says, 'Yes, you throw up about my backing out of the drawing of the logs,' and it ended in a scrap.

"Q. Did you have a fight? A. Yes.

"Q. How did that fight start? A. Well, we both got a little angry and it started, I suppose.

"Q. Who struck the first blow? A. Mr. Hastings struck the first blow.

"Q. Struck you? A. Yes.

"Q. Strike him back? A. No, I never hit him at all.

"Q. How long did the row last? This fight? A. About two or three minutes. . . .

"Q. Well, after the fight was over, what then? A. Then he had the load on, and Mr. Chalmers was ready to go, and he pulls out a bill he got; he says, 'Do you know that writing?' I says, 'Yes.' He says, 'What did you do with my oak?' He says, 'I will put you where you won't bother me for a while.' He started out to the road and he turned around and says, 'You go ahead

with the drawing of the lumber and I will not make any further trouble with you.' ”

On cross-examination the witness said:—

“Q. And you were near enough to see the writing, and when he said, ‘That is your handwriting?’ you said ‘Yes.’ Now, what else did he say? A. He says, ‘What did you do with my oak? I will put you where you won’t bother me for a while.’

“Q. What did you say to that? A. I made him no answer.

“Q. He says, ‘What did you do with my oak?’ He says, ‘If you do not make it right,’ or something of that kind, ‘I will put you where you do not want to go.’ A. He says, ‘I will put you where you do not want to go,’ or ‘Where you won’t bother me.’ He put the bill in his pocket and started off towards the road.

“Q. You said nothing? A. No.

“Q. You could have said it if you wanted to. A. Well, I——.

“Q. Just answer my question. A. He did not give me time to say much.

“Q. I am not asking you how much. You could have said to him, ‘I did not take your lumber,’ couldn’t you? A. It kind of struck me about the oak and I was just thinking what oak it was.

“Q. You were just considering what oak had been taken and that is the reason you did not answer? A. Yes. . . .

“Q. If you were an innocent man, why did you not answer him and deny it? A. He did not give me time.

“Q. . . . Why did you not do it? A. Well, I did not do it.

“Q. You did not do it? A. No, I think not. I was a little mad, I suppose.

“Q. But when he made the second remark to you, you answered that easy enough? A. Yes. . . .

“Q. You knew what he meant—that is, that he was charging you with some criminal wrong-doing—putting you where you would not get out very easy, you knew what he meant by that? A. I heard him say it and I was thinking what it was. I was not taking anything from him.

“Q. You knew what he meant when he said that? A. Yes.

“Q. You knew that he meant criminal prosecution? A. I did not know what he meant to do about it.”

D. C.  
1907  
STILL  
v.  
HASTINGS.  
Clute, J.



D. C.  
1907  
STILL  
v.  
HASTINGS.  
Clute, J.

The defendant laid the information charging the plaintiff with theft of his oak lumber afterwards on the same day. The trial was had, and the evidence called on both sides was concluded with some observations from the magistrate as to the difficulty of reaching a conclusion. The evidence before the magistrate, which was put in, is certainly very conflicting. The exchange is denied; the defendant swore that the plaintiff had disposed of his lumber to Smith.

At the close of the plaintiff's case Mr. Johnston submitted that there was no case made out to shew the absence of reasonable and probable cause; no evidence of malice; that, according to the plaintiff's own evidence, when the plaintiff had an opportunity of explaining why the lumber was missing, he did not deny it. Thereupon his Lordship, after hearing argument on behalf of the plaintiff, held that there were no facts in the case in dispute requiring determination by the jury; that "the uncontradicted evidence of the defendant's action establishes that there was no want of reasonable and probable cause. He had his lumber in the plaintiff's mill-yard. Some of it is missing. It is not necessary to deal with the disputes that were on foot between them with reference to the sawing and other matters. The plaintiff being the custodian of this lumber, the defendant finds it gone. He does not rush off and set the criminal law in motion, he makes inquiries in Burk's Falls as to where the lumber might have been taken to. He finds that Mr. Smith had bought some of it. He gets the bill from Smith as evidence that he purchased oak lumber from the plaintiff. He does not even proceed to the police office, but goes up to the plaintiff's mill for the purpose of getting his explanation of how this lumber came to be delivered by him to Smith. He shews him the bill. The plaintiff admits he made it out. He asks him then how it was that this lumber was taken to Smith's. He gets no reply. *The result of his attempt to ascertain from the plaintiff why he had been dealing in this way with his lumber leads to the assault which has been referred to.*

"These are then the facts, that his lumber is in the hands of a stranger, sold by the plaintiff; his endeavours to get an explanation from the plaintiff as to why he dealt with these matters in that way are not in dispute; and, failing to get it, he lays the information.

"I think that is ample evidence of the existence of reasonable and probable cause.

"I therefore have no alternative but to dismiss the plaintiff's action."

The learned trial Judge was, I think, in error in stating that the attempt to ascertain from the plaintiff why he had been dealing in this way with his lumber led to the assault. As a matter of fact, this lumber was not referred to, as far as the plaintiff's evidence shews, until after the assault, which was induced by the neglect or refusal of the plaintiff to deliver on the cars the defendant's lumber, which consisted of a large quantity, in addition to the oak.

So far as I can gather from the evidence, that was the only cause of the fight. It does not appear, so far as I can see, that there was any intention to charge the plaintiff with taking the defendant's lumber until after the fight occurred, and even then the defendant stated that there would be nothing more about it if he would go on drawing the lumber, that is, the balance of the lumber, to the cars. So that I think it is quite clear from the case made by the plaintiff that the non-delivery of the rest of the lumber was the real cause of the dispute, and not the question of the sale of the oak. I have quoted what the learned trial Judge said in full, that it may appear that no reference whatever is made to the exchange of the lumber. Now, if the plaintiff's evidence be true, that the exchange had in fact been made for the express purpose of enabling the plaintiff to fill his contract with Smith, and that that exchange had been made with the defendant personally, and the reason for it explained to him, and the fact of the exchange was present to his mind, then he had no excuse whatever for charging the plaintiff with having stolen his lumber, and this is the plaintiff's contention. It would certainly be some evidence of a want of reasonable and probable cause if the defendant had in fact made the exchange with the plaintiff and knew that the lumber which Smith had received was in fact the plaintiff's lumber. There is no evidence that he had forgotten it, and, even if he had so stated, I think it is for the jury to say whether they believed him or not. I quite agree, if the facts were simply these: that the defendant had lumber in the plaintiff's yard; that when he went to obtain that lumber, he found that it was gone; that he demanded an explanation, and that no explanation what-

D. C.

1907

STILL

v.

HASTINGS.

Clute, J.

D. C.  
1907  
STILL  
v.  
HASTINGS.  
—  
Clute, J.

ever was given; that these facts not being in dispute it might fairly be inferred that the defendant would have reasonable and probable cause for believing that the plaintiff had stolen his lumber. But here we have evidence tending to shew that the lumber delivered to Smith was the plaintiff's own lumber, and that the defendant knew it, and, with that knowledge, having become angered against the plaintiff upon another ground, for another reason, he asks where the lumber is which he knows he has exchanged with the plaintiff—if the plaintiff's evidence is to be believed—and, receiving no answer, lays the information charging the plaintiff with theft. Of course, the evidence offered on behalf of the defendant may put an entirely different complexion upon the case; but, at the close of the plaintiff's case, I think there was some evidence of a want of reasonable and probable cause which ought to have been submitted to the jury. If the facts were in dispute, it would still be for the jury to say whether there had been an exchange; whether the defendant acted *bonâ fide* in laying the information; and whether he in fact believed that the plaintiff had been guilty of theft. As stated by the learned trial Judge, "If there are facts in dispute, the jury must pass upon these facts before the Court can say whether reasonable and probable cause is or is not absent."

The onus of proving the want of reasonable and probable cause and of proving the existence of such facts as are evidence of such want, no doubt lies on the plaintiff: *Abrath v. North Eastern R.W. Co.*, 11 Q.B.D. 440, 11 App. Cas. 247. Where there are no facts nor any inference from facts in dispute, reasonable and probable cause was always held to be a question to be determined by the Judge alone: *Panton v. Williams* (1841), 2 Q.B. 169, at p. 192; *Michell v. Williams* (1843), 11 M. & W. 205; *Lister v. Perryman*, L.R. 4 H.L. 521. "In order to justify a defendant, there must be a reasonable cause,—such as would operate on the mind of a discreet man; there must also be a probable cause,—such as would operate on the mind of a reasonable man; at all events such as would operate on the mind of the party making the charge; otherwise there is no probable cause:" *Broad v. Ham* (1839), 5 Bing. N.C. 722, 725, *per Tindal*, C.J.

It is, I think, for the jury to say whether or not the defendant honestly believed the plaintiff guilty of the offence at the time



the information was laid: *Brown v. Hawkes*, [1891] 2 Q.B. 718 (C.A.). Here, if the plaintiff's evidence is to be believed, the defendant had personal knowledge of the facts, and there is no evidence or even suggestion that he had forgotten them. That is not the position taken by the defendant. If the defendant did not believe that he had a right to prosecute, that is evidence of want of reasonable cause: *Turner v. Ambler*, 10 Q.B. 252; and if the plaintiff's evidence is true, the defendant did know that he had no right to prosecute, because the lumber alleged to have been stolen was the property of the plaintiff. The belief or disbelief of the defendant is a question for the jury: *Taylor v. Willans* (1831), 2 B. & Ad. 845, 857, where it is said that slight evidence of the defendant's knowledge of the insufficiency of his charge is all that is required, as it is difficult to prove a negative. Here there was positive evidence, if the plaintiff is to be believed, because the exchange was made by the defendant himself. In the present case I think there were at least two questions which ought to have been submitted to the jury: (1) Did the defendant believe that the plaintiff had stolen his lumber? (2) Did the exchange in fact take place as alleged by the plaintiff? But it is said that the defendant having charged the plaintiff with having taken his lumber, the plaintiff made no answer; and it would appear that his refusal was really the ground of nonsuit. I think his refusal must be considered having regard to all the circumstances of the case. It may well be that, having actually made the exchange, he was non-plussed by the defendant's charge. If the charge was in fact not made in good faith, the plaintiff was not, I think, bound to answer. The men were quarrelling. If the plaintiff's contention is true, at the very time the defendant charged the plaintiff with the theft, he knew, or he ought to have known, that there was no theft. If the exchange took place, and the defendant should allege that he had forgotten it, the question of his *bona fides* would still be for the jury.

It was strongly contended by Mr. McKay that *Archibald v. McLaren*, 21 S.C.R. 588, is an authority in favour of the plaintiff. See also *Young v. Nichol*, 9 O.R. 347, 349; *Hamilton v. Cousineau*, 19 A.R. 203. I am of opinion, however, that these cases support the view that there was evidence which ought to have been submitted to the jury on the question of want of reasonable and proba-

D.C.  
1907  
STILL  
v.  
HASTINGS.  
Clute, J.



D. C.  
1907  
STILL  
v.  
HASTINGS.  
—  
Clute, J.

ble cause. There was, I think, also evidence of malice. From the want of reasonable and probable cause malice may be inferred. *Burley v. Bethune* (1814), 5 Taunt. 580, 583; *Heath v. Heape* (1856), 26 L.J.M.C. 49. It is, however, not conclusive evidence of malice: *Mitchell v. Jenkins* (1833), 5 B. & Ad. 588. It is evidence for the jury to consider with the other facts of the case: *Brown v. Hawkes*, *supra*. But in the present case, in addition to the inference from want of reasonable and probable cause, there was, I think, actual enmity existing at the time, and personal enmity is evidence of malice; but any indirect motive is sufficient. The men had been quarrelling about another matter; the threat was then made, but before leaving the defendant stated that, if the balance of the lumber were delivered, nothing further would be done. Here we have not only enmity but indirect motive. There was evidence of malice, in my judgment, that ought to have been submitted to the jury.

The judgment directed at the trial in favour of the defendant should be set aside and a new trial ordered, with costs to the plaintiff of the former trial and of this appeal.

MULOCK, C.J., concurred.

E. B. B.

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## [IN THE COURT OF APPEAL.]

MACOOMB ET AL. V. TOWN OF WELLAND.

C. A.

1907

Jan. 22.

*Highway—Dedication—User by Public—Action—Parties—Attorney-General.*

In an action for a declaration that a portion of the River road lying between Bugar and Dorothy streets, in the town of Welland, was not a highway, but the private property of the plaintiffs:—

*Held*, reversing the judgment of Anglin, J., 12 O.L.R. 362, that the evidence did not establish dedication, and that the plaintiffs were entitled to succeed. *Held*, also, that the Attorney-General was not a necessary party.

APPEAL by the plaintiffs from the judgment of Anglin, J., 12 O.L.R. 362 (where the facts are stated), dismissing the action, which was brought to obtain a judgment declaring that the portion of the River road leading from Port Robinson to Welland along the bank of the Chippewa creek or Welland river, lying between Bugar street and Dorothy street, in the town of Welland, was not a highway, but the private property of the plaintiffs.

The appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, and MEREDITH, JJ.A., on the 28th and 29th November, 1906.

*G. Lynch-Staunton*, K.C., *W. M. Douglas*, K.C., and *T. D. Cowper*, for the appellants. It is not contended that this road was laid out by virtue of any statute. Any right which the corporation may have acquired was parted with when the by-law of the township of Crowland was passed. There is no evidence of the expenditure of public money for opening an existing road, and there is no such thing as statute labour in this municipality. User is merely evidence, and does not constitute dedication; there must be an intention to dedicate. See *Rex v. Lloyd* (1808), 1 Camp. 260, 10 R.R. 674, and cases in note; *The Queen v. Inhabitants of the Tithing of East Mark* (1848), 11 Q.B. 877, 884; *Poole v. Huskinson* (1843), 11 M. & W. 827, 63 R.R. 782; *Mann v. Brodie* (1885), 10 App. Cas. 378; *Dunlop v. Township of York* (1869), 16 Gr. 216; *Regina v. Plunkett* (1862), 21 U.C.R. 536; *Healey v. Corporation of Batley* (1875), L.R. 19 Eq. 375, 388. *Mytton v. Duck* (1866), 26 U.C.R. 61, is not good law if it is to be given the construction which the trial Judge gives it; it is inconsistent with *St. Vincent v. Greenfield* (1887), 15 A.R. 567, 571. See also *Regina*

C.A.

1907

MACCOOMB  
v.  
TOWN OF  
WELLAND.

v. *Rankin* (1857), 16 U.C.R. 304; *Regina v. Hall* (1866), 17 C.P. 282; *Hubert v. Township of Yarmouth* (1889), 18 O.R. 458. Evidence was improperly admitted at the trial to explain or vary the entries in the assessment rolls. The evidence of the Misses McGlashan as to why their father had planted a hedge on the property in litigation, was improperly rejected. The evidence establishes that Bugar street was unfit for travel considerably later than 1874. Use of the road before the opening of Bugar street could have no effect upon the question of dedication, under the provisions of the by-law referred to, because the public until the opening of Bugar street were entitled to use the road, according to the by-law. There is no evidence of dedication by any of the various owners since Bugar street was opened up. The defendants are estopped from laying claim to the road, having assessed the plaintiffs and their predecessors in title therefor, and collected taxes thereon. The conveyances affecting the part owned by the plaintiff Wells contain the following reservation: "Subject nevertheless to the reservations, limitations, provisoes, and conditions expressed in the original grant thereof from the Crown, and to any right the public may have in that portion of said lot now used as a highway across said lands." But the public had no rights whatever at the date of any of these conveyances. The defendants are endeavouring to obtain more than their rights; it would require the strongest evidence to rob these plaintiffs of their property.

*E. D. Armour*, K.C., for the defendants. The road in question is one in which the general public have rights, and these rights cannot be taken away without representation. The soil is vested in the Crown. The defendants do not represent the general public, and the Attorney-General is a necessary party to the proceedings. Some one else might bring an action. See *Re Trent Valley Canal* (1886), 11 O.R. 687. The by-law of the municipality referred to, while *intra vires* in closing up the road, was *ultra vires* in the condition imposed as to using it before Bugar and Dorothy streets were open for public use. The by-law legally closed the street, and from that date user by the public should be considered evidence of dedication, notwithstanding the by-law. If user cannot be considered as evidence of dedication from the time when Bugar street became generally used, it has been continuous by the public ever since without any objection. The street has, to the knowledge

of the adjoining owners, been constantly repaired and kept in order by the defendants in the same manner as other roads or streets of the same kind. While it may be that the expenditure of public money *per se* has not made it a highway, in any event such expenditure and the work done thereon, by and on behalf of the public, indicate an acceptance by the public of the gift of the land, by the owner of the fee, as a public highway. The intention of the owner is also apparent from the fact that the land on which the public travelled was fenced off from the adjoining closes; that later on a hedge was planted, thus continuing the exclusion; and in some of the deeds the rights of the public were expressly saved. These plaintiffs cannot maintain the action because the plaintiff Wells has no title. If any admission at the trial is in the defendants' way, I ask to be relieved from it.

*Lynch-Staunton*, in reply, referred to *Moore v. Woodstock Woollen Mills Co.* (1899), 29 S.C.R. 627.

January 22. Moss, C.J.O.:—In this case the plaintiffs appeal from a judgment reported 12 O.L.R. 362, pronounced by Anglin, J., after trial without a jury, dismissing the action.

The plaintiffs' claim is, as owners of certain parcels of land fronting upon the Welland river, for a declaration that no highway exists over those parcels of land, and that the defendants have no right of way or interest in them and no right to enter upon or exercise municipal control over them, and for an injunction restraining the defendants from entering upon them.

A further claim made by the plaintiff G. W. Wells for rectification of a conveyance of a portion of the lands executed by the defendants to one James McGlashan was submitted to by the defendants, and the only question on this branch is as to the effect, if any, of the rectified conveyance upon the relief now sought by the plaintiffs against the defendants.

By their statement of defence the defendants admitted the allegations made in the statement of claim that the lands traversed by the alleged highway are owned in fee by and in the actual possession of the plaintiffs, but they asserted the existence of a road or highway, which they alleged had not been legally closed and conveyed to the plaintiffs' predecessor in title in manner and form as alleged by the plaintiffs, but, on the contrary, the de-

C. A.

1907

MACOOMB

TOWN OF  
WELLAND.



C. A

1907

MACCOOMB

v.

TOWN OF  
WELLAND.

MOSS, C.J.O.

fendants had since the year 1855 used the road as a public highway and caused statute labour to be done thereon, and by reason of such constant user and performance of statute labour had obtained the right to maintain the said road as a public highway.

Before trial the defendants consented and agreed that production of a copy of a by-law of the township of Crowland closing the River road and production of a copy of deed from the township to Thomas Bugar would be admitted as sufficient evidence of the legal closing of said road and of title thereto in Thomas Bugar, the plaintiffs' predecessor in title.

At the trial the plaintiffs put in a copy of a by-law passed by the municipal corporation of the township of Crowland for closing the concession line across lot 24 between the 4th and 5th concessions of the township, and also the road known as the Welland River road from the place where Bugar street intersects the said road west to the concession line between the 4th and 5th concessions, in lieu of Bugar street as shewn and laid down in a map referred to in the by-law, and for the conveyance to Thomas Bugar in fee of the said concession line and road as described in the by-law. This was done in consideration of Thomas Bugar opening for public travel the streets called in the by-law Main and Bugar streets. And it was further enacted by the by-law that the said Thomas Bugar should have the right to close up the concession line and River road as soon as Main and Bugar streets were opened for public use and travel, and that the road allowance and River road should from and after the day the said Thomas Bugar should open for public travel the said Main and Bugar streets, given in lieu thereof, cease to be public roads or highways, and should be and remain forever closed up, and the right of the public to travel thereon should cease and determine.

The plaintiffs also put in a copy of a registered memorial of a conveyance made the 27th December, 1855, by and between the municipal council of the township of Crowland, of the first part, and the said Thomas Bugar, of the second part, whereby, after reciting the by-law, the corporation of Crowland granted and conveyed to Thomas Bugar in fee the portions of the concession line and the River road as described in the deed and in the map of the premises referred to in the by-law.

In the year 1856 the defendants were incorporated as the municipality of the town of Welland, with boundaries embracing the premises in question, but it is clear that at that time they acquired no title to the portion of the River road now in dispute. And, as put by the learned trial Judge at p. 363, "this land must, for the purposes of this action, be deemed to have become private property in 1855." And, as he further goes on to say, "if a highway now exists upon it, it must be by virtue of an express or implied dedication thereof by the owner for the purpose of a highway since that date."

Except a subsidiary question as to parties, which may be put aside for the present, there remained to be dealt with by the learned trial Judge only the question whether the facts shewn in evidence established a dedication of the lands as a public highway. The learned Judge determined the question in the defendants' favour.

It goes almost without saying that the onus of shewing dedication was upon the defendants: see *Chinnock v. Hartley Wintney Rural District Council* (1899), 63 J.P. 327. The soil and freeholds having been shewn to be vested in the plaintiffs, it was incumbent on the defendants to shew clearly and beyond any reasonable doubt that the plaintiffs' ownership had become subject to a right in the public, the question being whether, as against the plaintiffs, there was sufficient evidence of an intention on the part of the owners of the soil to dedicate the land to the public as a highway. Commencing, therefore, with the highway closed by by-law and the fee vested in the plaintiffs' predecessors in title in 1855, the inquiry is by what means, if at all, has this land been again converted into a highway. The defendants rely on user and the performance of statute labour, or, what seems to have been considered equivalent to the latter, work done on the roadway and paid for by the defendants.

In considering the question it is important to bear in mind that we are not left in uncertainty as to the intentions in 1855 of the parties now represented by the plaintiffs and defendants respectively. It is clear that all parties then intended that the portion of the River road now in dispute should cease to be a highway, and that in lieu thereof the portion of Burgar's property now known as Burgar and Dorothy streets should be erected into highways. And it is equally clear that Burgar and Dorothy streets are now

C. A.  
1907  
MACCOOMB  
v.  
TOWN OF  
WELLAND.  
Moss, C.J.O.

C. A.  
1907.  
MACOOMB  
v.  
TOWN OF  
WELLAND.  
Moss, C.J.O.

highways in the defendants' municipality. It is also to be borne in mind that, as found by the learned Judge, Bugar street was unfit for use as a public highway and was not opened for traffic until 1873 or 1874. After it was opened, it was used, but it appears not to have been in very good condition for traffic, and the use of the old roadway was not discontinued entirely. Traffic was divided between it and Bugar street. But, in view of the circumstances of the locality at that time, not much weight ought to be attached to this fact. The roads were clay and heavy and difficult for travel or traffic, particularly at some seasons of the year, and persons travelling upon them naturally sought the easiest way. It is reasonable to regard such user from the point of view to which expression was given by the late Chief Justice Spragge when Vice-Chancellor in the case of *Dunlop v. Township of York*, 16 Gr. 216, at p. 222: "In a new country like Canada it would never do to admit user by the public too readily as evidence of any intention to dedicate. Such user is very generally permissive and allowed in a neighbourly spirit by reason of access to market or from one part of a township to another being more easy than by the regular line of road. Such user may go on for a number of years with nothing further from the mind of the owner of the land or the minds of those using it as a line of road than that the rights of the owner should be thereby affected." Having regard to the terms of the by-law and the fact that Bugar street was not open for traffic until 1873 or 1874, the user of the River road by the public up to that time cannot be regarded as any evidence of intention to dedicate. And as to continuance of user thereafter there is nothing upon the evidence to indicate that it was permitted in pursuance of an intention formed by the owner to dedicate that which had been acquired for the purpose of putting it out of existence as a public highway. User originating as shewn in this case cannot be regarded as carrying as much weight as evidence of intention, as user commenced and continued for a number of years with no qualified circumstances appearing. There appears to be no reason against applying to the former case considerations the converse of those applied by Lord Tenterden in *The King v. Inhabitants of Parish of St. Benedict* (1821), 4 B. & Ald. 447, as explained by Blackburn, J., in *The Queen v. Inhabitants of Township of Bradfield* (1874), L.R. 9 Q.B. 552, at p. 555, viz.,



that in the case of a road originally set out as an occupation road, the degree of user by the public should be more narrowly watched than in the case where the way had never been private. May it not be said, in the case of a road originally public but closed by municipal by-law with the intent of putting it out of existence as a public highway, that the subsequent user by the public should be more carefully scrutinized?

In 1871 the land was acquired by one A. J. McAlpine, who was a witness at the trial. He said that after he acquired it he allowed people to use the road, and he put a snake fence along the south side of the road to keep them from driving over from the road on the land. When he did this does not clearly appear, but apparently it was soon after he became the owner. He gave as his reason that he supposed it belonged to the public—and in this he was not far from correct, in a sense, for until 1873 or 1874, when Burgar street was opened, the public were entitled to use it. And this would account for the addition to the *habendum* in the conveyance from him of part of the land on which the fence was, to A. Williams on the 16th July, 1873, of the words “and to any right which the public may have in that portion of said lot now used as a highway across said lands.” In a deed from McAlpine to James McGlashan of another part of the lands, dated the 9th July, 1884, similar words occur, probably following the terms of the earlier conveyance. At all events they should be regarded rather as due to misapprehension with regard to a supposed existing right than as a deliberate declaration of intention to dedicate. McAlpine’s testimony does not lead to the impression that he would have acted as he did but for his mistaken belief that there was a public right. And it is clear that during his ownership the new public right now claimed was not irrevocably established. James McGlashan acquired the property now owned by the plaintiff Wells by three purchases, the first in 1883 and the last in 1885. During the year 1884 he completed the erection of a dwelling house on the part purchased from A. Williams. Before he built, the land was lying as a common not enclosed, and open to the coming of any one who wished to go over it. McAlpine’s snake fence had disappeared. The beaten track which had been made or preserved by the traffic that continued over it since Burgar street was opened was apparent on the ground, but in bad weather the track was not

C. A.

1907

MACCOOMB

v.

TOWN OF  
WELLAND.

MOSS, C.J.O.



C. A.  
1907  
MACOOMB  
v.  
TOWN OF  
WELLAND.  
MOSS, C.J.O.

adhered to. People driving sometimes went north and sometimes south of it, seeking the dryest and least muddy part of the ground.

The house was built fronting towards the river and so close to the edge of the track farthest from the river as to evidence that McGlashan could not have supposed there was a highway upon the land over which the public would be at liberty to pass in close proximity to his doors and windows. Shortly after its completion there seemed to be some opposition to the site of the house being placed where it was as tending to interfere with the roadway, but no action was taken, And in 1886 McGlashan planted a hedge in front, which extended to and in some parts was upon the track, and a few feet outside of this he stretched a wire so as to protect the hedge, the effect being that persons driving across the land were compelled to keep nearer to the edge of the river than formerly. It was a distinct interference with the line of the roadway as formerly used. And this condition has remained undisturbed to the present. These facts, as well as the evidence that from time to time McGlashan objected to, and in at least one or two instances prevented, workmen attempting to work with a scraper or construct a culvert, are inconsistent with intention to dedicate; and the actual interference with or partial interruption of the travel upon a portion of the track goes far to rebut any presumption arising from the user in the manner shewn.

In *Poole v. Huskinson*, 11 M. & W. 827, Parke, B., enunciated a principle since frequently quoted and acted upon. He said (p. 830): "In order to constitute a valid dedication to the public of a highway by the owner of the soil, it is clearly settled that there must be an *intention* to dedicate—there must be an *animus dedicandi*, of which the user by the public is evidence, and no more; and a single act of interruption by the owner is of much more weight, upon a question of intention, than many acts of enjoyment." Reference may also be made to *Chinnock v. Hartley Wintney Rural District Council* (*supra*), a case resembling the present case in several respects. It is true the interruption in this case did not extend to the whole roadway, but it was a substantial interference with the way quite sufficient to give ground for an action or proceeding for obstruction of the highway, if it was one. And it was certainly a most distinct assertion of right, quite inconsistent with an intention to dedicate.

In *Mytton v. Duck*, 26 U.C.R. 61, upon which the learned trial Judge chiefly if not wholly based his conclusion, the evidence was of continuous uninterrupted user for thirty years without objection or interference on the part of any person. There were no countervailing circumstances. And Draper, C.J., seems to have laid peculiar stress upon that state of facts as furnishing conclusive evidence of dedication. There also the origin of the road was obscure. No such circumstances or condition of affairs appeared as are apparent in this case and which quite distinguish it from the earlier case.

The evidence as to the work done by the defendants on the way or track is conflicting. It goes no further than to shew that at times workmen engaged by the defendants to do work on the streets in the defendants' municipality did some on the track, but it does not appear to have been done at regular times or periods. According to the evidence of the Misses McGlashan it was only done on two or three occasions between 1884 and 1887, and other testimony goes to shew that it was sporadic and unsystematic. It does not appear that specific directions were given for performance of work there, but the workmen, being directed to scrape the streets, sometimes included this track with the others. The payments that were made were simply payments to the men for their time in general, and there were no specific payments in respect of work done in this part of the municipality.

In *Regina v. Rankin*, 16 U.C.R. 304, it was shewn that much statute labour and public money had been expended upon the way in question over a period of 10 years before the defendant was indicted for obstructing it. Dealing with this branch of the case Sir John Robinson, C.J., said (p. 310): "The fact of the public using it for ten years, or expending money upon it between 1846 and the present time, is not sufficient to establish it as a lawful highway, against the will of the owner of the soil, where there is no sufficient ground for presuming a dedication." In *St. Vincent v. Greenfield*, 15 A.R. 567, Osler, J.A., delivering the judgment of the Court, said (p. 571): "If the road has been laid out and dedicated by the landowner, the performance of statute labour upon it, or the expenditure of public money in opening it, is evidence of its acceptance and establishment as a highway by the municipality, but the continued performance of statute labour upon a road which

C. A.

1907

MACCOOMB

v.

TOWN OF  
WELLAND.

Moss, C.J.O.

C. A.

1907

MACCOOMB

v.

TOWN OF

WELLAND.

MOSS, C.J.O.

was in its inception a trespass road does not, in my opinion, by force of the statute absolutely make such a road a public highway. It may at most raise a presumption of dedication, or be evidence from which a dedication by the owner may be inferred, and may throw upon him the onus of rebutting such presumption or inference. I do not think it has any higher effect." Having regard to the known circumstances connected with this way, it should require much more definite and undisputed evidence as to the work done or money expended to give rise to any inference against the original declared intention to close the road as a highway. It is to be observed that the learned trial Judge in his judgment appears to have attached little, if any, weight to this part of the defendants' case.

On the whole evidence, and having regard to the manner in which the alleged user first began, the qualified nature of the user in the later years, the acts of interruption, and the other circumstances, it does not appear that the defendants have clearly and satisfactorily established the existence of the public right they have asserted. Sufficient has been shewn to rebut any presumption of intention to dedicate or rededicate this old highway to the use of the public, and, that being so, the defendants' case fails. The judgment, therefore, should be in the plaintiffs' favour.

It was contended that the action was not maintainable without the Attorney-General being a party. The form of the action and the relief claimed are similar to those in *Chinnock v. Hartley Wintney Rural District Council* (*supra*). But the point made here is that if this has become a public highway the soil has become vested in the Crown and not in the municipality. The objection does not appear to have been taken until the trial. Whatever view may ultimately be taken of the effect of dedication of a highway by an individual, having regard to secs. 599 and 601 of the Municipal Act, it seems clear that in this case dedication would vest in the defendants a right of property in the highway sufficient to enable the action to proceed without the presence of the Attorney-General. It is not absolutely essential to the maintenance of the action.

On the argument of the appeal counsel for the defendants sought to be relieved from the admission of the plaintiffs' title and to be allowed to shew defects therein.



The admissions appear to have been made deliberately, and no special ground is made for opening the question at this stage.

The plaintiffs objected to the defendants' course in this respect, and it would certainly not be convenient to discuss now questions of title which were not before the trial Judge and as to which this Court is without the benefit of his opinion.

The appeal should be allowed and judgment entered for the plaintiffs with costs throughout.

MEREDITH, J.A.:—The one question is whether any one owning the land in question ever dedicated it, that is, made a gift of it, to the public for the purposes of a highway. That question is one purely of fact. Nearly all the cases of this character, which come before the Courts, have to be determined upon circumstantial evidence only; no direct evidence is available. The owners who were supposed to have dedicated were sometimes unknown, and often long since dead. In such cases it is not difficult to infer, from the mere fact of the existence of the way, the exercise of the right of public passage over it, for such a length of time and in such a manner that it must have been with the knowledge of the owner, that its existence was actually based upon a dedication by him; unless there is outweighing evidence to the contrary.

But this case is entirely different. Most of the owners are yet living, and there is direct testimony covering the whole ground, so that little strain is put upon the mind to ascertain from circumstances only what the intentions or acts of persons unknown, or long since dead, were—little need to grope in the dark for the truth.

We start with the agreement of the parties that the way in question was given by a municipality, the predecessors of the defendants, to one Bugar, in exchange for two new roads, to be opened by him upon his land, but this way was not to be closed until the new roads were opened. Bugar sold and conveyed his land before the roads were opened, and so to the *habendum*, in the statutory form of deed, the words, "subject to any right the public may have in that portion of the said lot now used as a highway across the said lands," were added. There is nothing to indicate any intention of Bugar to give to the public the three roads, everything points to an intention to close the one and open the other

C. A.

1907

MACCOOMB

v.

TOWN OF  
WELLAND

MOSS, C.J.O.



C. A.  
1907  
MACCOOMB  
v.  
TOWN OF  
WELLAND.  
Meredith, J.A.

two in lieu of it. I may add that the addition to the *habendum*, referring to any public right, appears in the title deeds of the parcel owned now by the plaintiff Wells, and not in the deeds of the other parcel.

One McAlpine acquired title from Bugar before the new roads had been opened, and so whilst the place in question remained a public way. McAlpine was a witness for the defendants, and an active opponent of the plaintiffs' claims, but made no pretence of having dedicated the way to the public. His story was that he did not object to the public use of the way, because he thought that it and all roads up and down the river, on both sides, belonged to the public. He owned the lands conveyed to him for 17 years, and in the deed which he then made of them, precisely the same words were added to the *habendum* as in Bugar's deed. It is quite clear that he never intended to dedicate, and never did dedicate the way to the public; nor can the addition to the *habendum* have any such effect; if the public had no right, the grantee took the way, with the rest of the land, absolutely; nor, if McAlpine had not been examined, would those words have indicated that a dedication was made by him; on the contrary, they would indicate that he had not, for, if he had, they would be definite in terms, referring to a right given by him, not a mere copy of the words of the earlier deed, indefinite as to locality, and indefinite as to whether there was or was not any public right.

Another owner was James McGlashan, a retired gentleman, who died in the year 1897; but his two daughters, who lived with him until his death, and almost necessarily knew all about the property from the time he purchased it in 1883, and built upon it in the following year, are living, and were witnesses. They occupied the property with him during all those years; and their testimony puts it beyond controversy that he never dedicated, or intended to dedicate, the way to the public; that it was used against his will; and that, though he chafed under it, he took no legal proceedings to prevent it, he could not afford to do so. The testimony of these witnesses was taken upon a commission, and so we are in quite as good a position to form a true opinion of the character of it, as the trial Judge was. So far as one can see, these witnesses had not the least interest in the matter, and give their testimony in a most intelligent and trustworthy manner. The learned trial

Judge expressed the opinion that their evidence, as to their father's intentions, was inadmissible; but why so, if they knew what his intentions were? It can hardly be that an intention is to be imputed to him without any evidence of any expressed intention, and that that inference cannot be corrected by his actual expressed intentions and his whole course of conduct respecting the matter. It is abundantly proved that this owner never intended to, and did not, make any actual dedication of the way. Of course, submission to a wrong may ripen into a gift, as for instance when the facts prove that the person imposed upon preferred to make a gift of the thing in dispute rather than fight over it, and that that preference was acted upon; but that is not, nor is it anything like, this case.

This substantially covers all the owners from whom a dedication could be inferred.

There are many circumstances which indicate a dedication, and there are not a few which have a contrary indication; it may very well be that, if there were no direct evidence of the actual intention and acts of the owners, the plaintiffs would fail in this action; but, upon the whole evidence, I can come to no other conclusion than that, since the conveyance of the way to Burgar, there has never been any dedication of it, nor any intention to dedicate it, to the public.

It was contended that the Attorney-General was a necessary party to this action. But why so? Certainly not from the standpoint of the plaintiffs' claim, which is substantially to prevent the defendants trespassing upon their land. They make no sort of claim in respect of any right which they have, or claim, in common with the rest of the public. And why may they not prevent any individual, or corporation, committing a trespass upon their private property, whatever may be the nature of the defence which may be set up? A judgment against the defendants will bind the defendants only; if all rights in public ways are not vested in them, such a judgment would not prevent any one of the public taking the proper steps to enforce public rights, or to punish any criminal interference with them; whilst, if all rights were vested in the defendants, the Attorney-General would be an improper party to the action.

C. A.

1907

MACCOOMB

v.

TOWN OF  
WELLAND.

Meredith, J.A.

C. A.  
1907  
MACCOOMB  
v.  
TOWN OF  
WELLAND.  
Meredith, J.A.

Notwithstanding the clear admission of the plaintiffs' title made in the defendants' pleadings, and the fact that what the parties, naturally, and very properly, desired, was really a determination of the substantial question of dedication, or no dedication, it is now sought to withdraw the admission in regard to the title of one of the plaintiffs only, and to defeat the action, so far as he is concerned, on the ground that his paper title is not perfect. Why should that be done, when it would leave the substantial question yet to be solved in regard to the other plaintiff? It is the same way, at the same place; so what object, except so far as costs are concerned, in now limiting the judgment of the Court, whichever way it may go, to one part, and not deal with the other in form, though in substance and in fact doing so? I would leave the parties just where they very sensibly put themselves in the pleadings, and where they contentedly continued up to the trial.

The appeal should, therefore, in my opinion, be allowed, and judgment should be entered for the plaintiffs enjoining the defendants from trespassing upon the land in question; possession is not claimed.

GARROW and MACLAREN, JJ.A., concurred.

E. B. B.

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## [IN THE COURT OF APPEAL.]

NORTHERN ELEVATOR CO. v. LAKE HURON AND MANITOBA  
MILLING CO.

C. A.

1906

Mar. 26

1907

Jan. 22

*Contract—Construction—Sale of Wheat—Correspondence by Telegraph—Price of Wheat—Ascertainment by Reference to Quotations—Evidence—Trade Usage or Custom.*

On the 22nd May, 1903, the plaintiffs, grain merchants at Winnipeg, Manitoba, telegraphed to the defendants at Goderich, Ontario: "Referring to my telegram we offer subject to immediate reply by telegraph one cargo about eighty thousand bus. part number one hard three over part number two northern one quarter under New York July c.i.f. Goderich in ten days, terms twenty-five thousand sight draft balance weekly payments as suggested int. and ins. Goderich paid by you as before if you wish will fix price to-day's close hard eighty-two cents two northern seventy-eight and three quarters telegraph immediately whether you accept or not can give you more two northern than one H."

The defendants telegraphed to the plaintiffs on the next day: "We accept half one hard half two northern price fixed date shipment or sooner."

Five days later the plaintiffs telegraphed to the defendants: "Probably send Algonquin to-morrow takes about fifty-eight thousand two northern thirty-seven thousand one hard do you want the surplus fifteen thousand two northern one half under July telegraph immediately on receipt."

And on the same day the defendants telegraphed to the plaintiffs: "We accept will provide insurance here see to-day's letter."

The 95,000 bushels of wheat mentioned were shipped and received by the defendants, and, a dispute having arisen as to the price, the plaintiffs withheld the bill of lading for 10,000 bushels of the 95,000, and the defendants having, notwithstanding the absence of the document, taken the 10,000 bushels, the plaintiffs brought this action for conversion thereof, or alternatively for the balance of the price. The defendants maintained that the price was paid in full:—

*Held*, that there was a complete contract for the sale of the goods in question, at a price to be fixed, on or before the date of shipment, by reference to New York quotations; and that the words used by the plaintiffs "three over . . . one quarter under New York July" had not the effect of importing into the contract a term, in accordance with a custom or trade usage of the wheat market at Winnipeg, of which evidence was given at the trial subject to objection, that the buyer was bound to sell a similar quantity of New York wheat to the original vendor.

Judgment of FALCONBRIDGE, C.J.K.B., affirmed.

THE plaintiffs by the statement of claim alleged: (1) that they were an incorporated company carrying on the business of grain merchants in the city of Winnipeg, in the Province of Manitoba, and the defendants an incorporated company carrying on the business of grain merchants and warehousemen in the town of Goderich, in the Province of Ontario; (2) that on the 29th May, 1903, the plaintiffs shipped to the defendants, by the steamship "Algonquin," 10,000 bushels of Manitoba "Two Northern" wheat, to be held by the defendants as warehousemen for and subject to



C. A.  
—  
NORTHERN  
ELEVATOR  
Co.  
v.  
LAKE  
HURON  
AND  
MANITOBA  
MILLING  
Co.

the order of the plaintiffs; (3) that the defendants received and accepted the wheat as such warehousemen, and undertook to hold and deliver the same to the plaintiffs, but the defendants, in violation of their duty as such warehousemen, converted the wheat to their own use; and the plaintiffs claimed from the defendants \$10,000 as damages for such conversion.

By their statement of defence the defendants: (1) denied the allegations contained in the first paragraph of the statement of claim, in so far as it was therein stated that the defendants carried on the business of grain merchants and warehousemen; (2) denied all the other allegations contained in the statement of claim, and put the plaintiffs to the proof thereof; (3) alleged that in May, 1903, they (the defendants) purchased from the plaintiffs, and the plaintiffs delivered to the defendants, by the said steamship "Algonquin," 95,000 bushels or thereabouts of wheat, at a price which had theretofore been agreed on between them; (4) alleged that, so far as the defendants could ascertain, the 10,000 bushels of wheat referred to in the statement of claim formed part of the 95,000 bushels; (5) alleged that the said grain was not received by the defendants as warehousemen, but as purchasers thereof at an agreed-on price; (6) alleged that, after the said grain was so as aforesaid received by the defendants, they paid to the plaintiffs the full amount of the agreed-on purchase money, together with interest thereon, and all other charges in connection therewith; and (7) alleged that the defendants were not, at the commencement of this action, nor afterwards, indebted to the plaintiffs for the said grain or any part thereof.

The facts are stated in the judgments.

The trial was begun before FALCONBRIDGE, C.J.K.B., without a jury, at Toronto, on the 5th January, 1906, when the evidence was taken.

Written arguments and the stenographer's notes of testimony were afterwards delivered to the Chief Justice, the latter in February.

*J. H. Moss and Featherston Aylesworth*, for the plaintiffs.

*W. Proudfoot*, K.C., for the defendants.

March 26. FALCONBRIDGE, C.J.:—This is an interesting case, and one in which I confess to have experienced an unusual amount of doubt and difficulty before arriving at a conclusion.

The plaintiffs carry on business in the city of Winnipeg. The defendants are described in the statement of claim as carrying on the business of grain merchants and warehousemen in the town of Goderich. The defendants, however, claim, so far as this action is concerned, to be treated as millers and not as grain merchants or speculators.

The action as set up in the statement of claim is based upon the alleged conversion by the defendants to their own use of 10,000 bushels of wheat, part of a cargo of 95,000 bushels shipped by the plaintiffs to the defendants.

But the real dispute between the parties is as to the price of the wheat; and a dispute having arisen between the parties, the plaintiffs withheld the bill of lading for the last 10,000 bushels, but the defendants, notwithstanding the absence of this document, contending that the wheat was all paid for, took the 10,000 bushels covered by the bill of lading referred to, which is the alleged conversion.

The real issue (apart from any question of pleading) between the parties, is whether the defendants have or have not paid in full for the 95,000 bushels.

The defendants first approached the plaintiffs by letter, dated the 28th April, 1903, stating that the defendants would require wheat, and asking in about what shape and at about what price the plaintiffs could furnish it. The plaintiffs replied by letter dated the 2nd May, 1903, stating that they were "selling wheat every day for export on the basis of 3 over New York July for one hard, and 1½c. over for one northern c.i.f. Georgian Bay or Buffalo; and adding, "We are open to sell to you at the same price."

The plaintiffs allege that in stating their willingness to deal on the basis of 3 over New York July, they were suggesting the adoption in selling to the defendants of a well established and clearly defined method of dealing. The plaintiffs ask me to find that there exists in the grain trade on this continent a clearly defined and well understood usage, by which what is known as cash wheat is sold on the basis of future wheat of a stated month on one of

C. A

1906

NORTHERN  
ELEVATOR  
Co.v.  
LAKE  
HURON  
AND  
MANITOBA  
MILLING  
Co.Falconbridge,  
C.J.

C. A.  
1906  
NORTHERN  
ELEVATOR  
Co.  
v.  
LAKE  
HURON  
AND  
MANITOBA  
MILLING  
Co.  
Falconbridge,  
C.J.

the established produce exchanges, and that when a vendor of cash wheat agrees to sell the same to a purchaser on the basis of 3 over New York July, the transaction involves a sale by the vendor of the cash wheat and a counter sale by the purchaser of the New York July wheat to the vendor of the cash wheat, and that the purchaser of the cash wheat shall pay the vendor 3 cents a bushel more than the vendor pays him for the New York July wheat.

The plaintiffs further ask me to find that in a contract of this character it is the duty of the purchaser of the cash wheat to deliver the New York July wheat to the vendor, either through the purchaser's own broker or by giving the vendor an order to buy in the New York market on the purchaser's account; that the delivery of the New York July wheat in one or other of these ways is essential in order to fix the price of the cash wheat; and that there is no other recognized method of fixing the price of cash wheat but by delivery of the New York July wheat.

Further correspondence passed between the parties, and on the 21st May the defendants sent a telegram to the plaintiffs as follows: "Can you give us Rosedale next week 3 over New York July one hard half under two northern say half each \$25,000 cash, balance three weekly payments." To which the plaintiffs replied by telegram on the 22nd May: "Referring to your telegram of 21st Rosedale loads for Midland cargo sold trying get her next trip about first of next month or Algonquin about 29th of this month. Price one hard all right but No. 2 northern half too low can give about two-thirds one hard I will telegraph when hear from boats.—R. H. Crowe."

And on the same day the plaintiffs wrote as follows: "Referring to telegram, we do offer, subject to your immediate reply by telegram, one cargo about eighty thousand part number one hard wheat three over part number two Manitoba northern wheat a quarter under New York July c.i.f. Goderich, shipment in ten days, terms twenty-five thousand dollars sight draft, and balance weekly payments as suggested, interest and insurance Goderich paid by you, as before. If you wish will fix price to-day one hard eighty-two two northern seventy-eight and three-quarters. Telegraph immediately whether you accept or not. Can give you more two northern than one hard.—G. R. Crowe."

And also as follows: "Had your telegram this morning (dated

yesterday) asking if we could give you some one hard on the steamer Rosedale at 3 over New York, July, next week, and some two northern at half under, and I have responded by two telegrams to-day. At the time of writing we have offered you a cargo of about 80,000 bushels, the one hard at 3 c. over New York July, and the two northern at  $\frac{1}{4}$  c. under New York July, c.i.f. Goderich, and have said to you it would be satisfactory to draw when shipment was made, for about \$25,000, value of the grain, and the balance to be stored in your elevator subject to our order, payments to be made at your convenience, you to pay us interest at the rate of 6% and the actual cost of insurance. I further stated that you could if you wished fix the price of the wheat on the basis of to-day's close, which would be 82 c. for the one hard and 78 $\frac{3}{4}$  for the two northern. Ellis sold one hard wheat for me to-day that nets us 82 c. c.i.f. Goderich.—G. R. Crowe."

The defendants replied by telegram on the 23rd May: "We accept half No. 1 hard half No. 2 northern price fixed date shipment or sooner.—Lake Huron and Manitoba Milling Co."

The plaintiffs wrote on the 23rd May as follows: "Since writing you yesterday we have your telegram this morning accepting our offer of a cargo of wheat about half one hard and half two northern, the quantities of each to be made to conform with the ship's compartments, and the price is 3 c. over New York July for the one hard and  $\frac{1}{4}$  c. under New York July for the two northern, c.i.f. Goderich. Since wiring you yesterday I have engaged the steamer Rosedale to take this cargo. Of course, if any mishap to the Rosedale should occur, I would have to get another boat.—The Northern Elevator Co., Ltd., G. R. Crowe, General Manager."

The defendants wrote on the same day as follows:

"G. R. Crowe, Esq.,

Northern Elevator Co.,  
Winnipeg, Man.

Dear Sir: We received your wire yesterday, and regret that we were not able to answer promptly, having had considerable difficulty getting the manager over the 'phone at Toronto. However, we wired this morning accepting your offer of a cargo of about 80,000 bushels half one hard, half two northern c.i.f. Goderich, prices to be fixed date of shipment or sooner at 3 c. over New York July for one hard and  $\frac{1}{4}$  under for two northern.

C. A.  
1906

NORTHERN  
ELEVATOR  
Co.

v.  
LAKE  
HURON  
AND  
MANITOBA  
MILLING  
Co.

Falconbridge,  
C.J.



C. A.  
1906  
—  
NORTHERN  
ELEVATOR  
Co.  
v.  
LAKE  
HURON  
AND  
MANITOBA  
MILLING  
Co.  
—  
Falconbridge,  
C.J.

We will write you further regarding payments, but in the meantime they stand as per our telegrams. We will probably be able to arrange to accept sight draft for between 30,000 to 40,000.

Yours very truly,

Lake Huron & Manitoba Milling Co., Limited,

C. A. McGaw,

Secretary."

These letters and telegrams constitute the contract.

On the 28th May the plaintiffs telegraphed: "Probably send Algonquin to-morrow;" and offering a surplus 15,000 bushels of her cargo; and on the 29th May the plaintiffs telegraphed to the defendants: "Algonquin loading to-day due Goderich Monday morning."

The plaintiffs allege that the defendants' manager McGaw thoroughly understood the method of trading as above outlined, and that the contract was made with reference to such custom or usage. The defendants rely on the phrase which is used in their telegram of the 23rd May, "Price fixed, date of shipment or sooner." The plaintiffs' manager says that he observed both of these statements, but paid no attention to them, as he did not consider that they added anything to the well understood meaning of the contract, and that in fact the contract was, according to his ideas, complete without them, and therefore he saw fit to ignore them. I think that he had no right to do so. I am of the opinion that he ought to have at least inquired what the defendants meant by annexing a new term in the alleged well understood method of dealing. It ought to have been clear to him that the defendants intended them to have some meaning, and I think that they had a meaning. If the plaintiffs had refused to deliver wheat in accordance with the telegrams and letters, could the defendants have successfully maintained an action? I think not. The answer would be, "You imposed a new term, to which I never agreed."

In order that the plaintiffs shall succeed it becomes necessary to read into this contract the alleged custom that in a sale such as this there is an implied term that the defendants in settlement for the cash wheat must supply the July option. A custom to be binding must be universal, and the evidence of the custom must be clear, cogent, and irresistible: *Kirchner v. Venus* (1859), 12 Moo. P.C. 361, 381; *Burke v. Blake* (1875), 6 P.R. 260. If evidence of

a custom is tendered inconsistent with the agreement entered into, it cannot be received: *Hayes v. Nesbitt* (1875), 25 C.P. 101; *Marshall v. Jamieson* (1877), 42 U.C.R. 115; *Hayton v. Irwin* (1879), 5 C.P.D. 130; *Syers v. Jonas* (1848), 2 Ex. 111. The evidence of usage must be distinct in order to affect the meaning of the terms of the contract, and the evidence must be clear and consistent, otherwise the plaintiff fails: *Bowes v. Shand* (1877), 2 App. Cas. 455. The alleged custom here was stated to be universal, but that expression was qualified by the statement that Mr. Crowe meant at New York, Winnipeg, Chicago, and Minneapolis. It was not contended that it included Toronto, and in fact Mr. Crowe declined the defendants' proposition to arbitrate at Toronto, on the ground (see telegram of the 10th June) that Toronto people were not familiar with that class of trade.

It is to be borne in mind also that in this case the defendants appear as millers and not as warehousemen or speculators. It is quite true that Mr. McGaw, the defendants' manager, has had a good deal of experience. He had been in the grain trade at Winnipeg, where it is said this method of dealing is used, and he had on behalf of the defendants, in the year 1901, carried through a "deal" in Manitoba wheat on the basis of Chicago May wheat, on terms somewhat similar to but by no means identical with this. I mention this matter principally to shew that I think I have not overlooked any possible element in dealing with the case, and I do not think this circumstance sufficient to overbalance the considerations which preponderate in favour of the defendants.

I think, therefore, that the defendants are entitled to my judgment, and that the action must be dismissed with costs.

The plaintiffs appealed from the judgment of FALCONBRIDGE, C.J., and their appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, and MEREDITH, JJ.A., on the 26th and 27th November, 1906.

*J. H. Moss* and *Featherston Aylesworth*, for the appellants. The issue between the parties depends upon the construction of the contract contained in the telegrams. The appellants adduced evidence to explain the meaning of the technical expression "three over and one quarter under New York July," and it was established by an overwhelming preponderance of testimony that that

C. A.  
1906  
NORTHERN  
ELEVATOR  
Co.  
v.  
LAKE  
HURON  
AND  
MANITOBA  
MILLING  
Co.  
Falconbridge,  
C.J.

C. A.  
1907  
NORTHERN  
ELEVATOR  
Co.  
v.  
LAKE  
HURON  
AND  
MANITOBA  
MILLING  
Co.

expression had reference to a well understood method of dealing. This evidence was properly received, and was necessary in order that the contract might be intelligible. The result of the evidence is as follows. The vendor of what is known as cash wheat agrees to sell to a purchaser such cash wheat on the basis of future wheat of a stated month on one of the established produce exchanges, *e.g.*, on the basis of three over New York July. This means that the price is to be three cents more than the price of wheat deliverable in New York in July, and the price of New York July wheat is fixed in one of two ways: either the purchaser through his broker goes into the New York market and purchases the July wheat, which he tenders to his vendor; or he gives the vendor an order to buy the July wheat on the New York market on his (the purchaser's) account. The actual purchase of New York July wheat in either one of these ways is essential in order to fix the price of the cash wheat, and there is no other recognized method of fixing this price. As a rule the vendor of the cash wheat, as soon as he makes a sale on this basis, sells on the New York market a corresponding quantity of July wheat, so that he has no interest in the fluctuations of the New York market, and this course was adopted in the present case. It is, however, entirely optional with the vendor of the cash wheat to adopt this course or not, and his action in this respect has no bearing upon the rights of the parties. The evidence was adduced, not to read a custom into the contract but to explain a term which was actually in the contract. If it were the fact that the expression was not used at all in Toronto, that would not weaken the effect of the evidence that, wherever used, the expression had but one meaning. The defendants were familiar with this method of dealing, and had adopted it on previous occasions. The trial Judge treats the phrase "price fixed date of shipment or sooner," occurring in the defendants' telegram of acceptance of the 23rd May, as annexing a new term to the method of dealing. The defendants' manager, however, who was the author of the phrase, was not himself able to tell what he meant by it, and the plaintiffs were justified in treating it as an intimation that the defendants did not intend to adopt the plaintiffs' suggestion to fix the price on "to-day's close," and as an intimation of the defendants' intention to perform within a stated time the duty cast upon them by the contract of fixing the price by delivering



or tendering the New York July wheat. The phrase did not shift this duty to the plaintiffs, and when the defendants did not fix the price by the date of shipment the plaintiffs were justified in supposing that the defendants had changed their mind. The defendants' telegram contains an acceptance of the plaintiffs' telegram, and an interpretation should not be put upon ambiguous words which would defeat or qualify words which are clear and express: *English and Foreign Credit Co. v. Arduin* (1871), L.R. 5 H.L. 64, at p. 79, *per* Lord Westbury. There is no evidence to shew that the defendants assumed to deal with the plaintiffs on any other basis than as an ordinary purchaser of grain. Reference to Leake on Contracts, 5th ed., p. 132; *Ashworth v. Redford* (1873), 43 L.J.C.P. 57; *Humfrey v. Dale* (1857), 26 L.J. Q.B. 137; *Myers v. Saal* (1860), 30 L.J.Q.B. 9; *Tudgay v. Sampson* (1874), 30 L.T.N.S. 262; *Clayton v. Gregson* (1835), 4 N. & M. 602; *Juggornohun Ghose v. Manickchund* (1859), 7 Moo. Ind. App. 263; *Vose v. Morton* (1856), 5 Gray (Mass.) 594; *The "Reeside"* (1837), 2 Sumn. (U.S.) 567; *Smith v. Clews* (1889), 114 N.Y. 190.

*W. Proudfoot*, K.C., and *W. A. Skeans*, for the defendants. The plaintiffs' claim as pleaded is for conversion of 10,000 bushels of wheat. On the evidence, the transaction was a sale out and out of 95,000 bushels of wheat at a certain price, and no question of conversion ever arose. Until the difficulty arose, the plaintiffs did not assert that there was any question as to the ownership of the grain. The plaintiffs, having treated the defendants as the owners of the grain, should not now be permitted to say that they rely upon a custom. The plaintiffs' cause of action (if any) is for damages for breach of contract owing to the defendants' failure to deliver to the plaintiffs a July option for 95,000 bushels of wheat, and, as no evidence of damage was given, the plaintiffs fail. The words "price fixed date of shipment or sooner" had a meaning, and should not have been ignored by the plaintiffs. They meant that the price was to be fixed by the plaintiffs, who knew the date of shipment. A contract such as this is outside of the alleged custom. The plaintiffs failed to prove that they purchased 95,000 bushels of July wheat on the defendants' account, or that they sustained any loss. Reference to *Lewis v. Marshall* (1844), 7 M. & G. 729, 745; *Bartlett v. Pentland* (1830), 10 B. & C. 760, 776; *Hayton v. Irwin* (1879), 5 C.P.D. 130; *Shore v. Wilson*

C. A.

1906

NORTHERN  
ELEVATOR  
CO.

v.

LAKE  
HURON  
AND  
MANITOBA  
MILLING  
CO.



C. A.  
1906  
NORTHERN  
ELEVATOR  
Co.  
v.  
LAKE  
HURON  
AND  
MANITOBA  
MILLING  
Co.

(1842), 9 Cl. & F. 355; *Harris v. Moore* (1884), 10 A.R. 10; *Marshall v. Lynn* (1840), 6 M. & W. 109.

*Moss*, in reply. The plaintiffs are willing to amend so as to claim the balance of the price or damages for the non-delivery of the July option. Until the real, substantial breach occurs, the time for measuring damages has not arrived *Tyers v. Rosedale and Ferryhill Iron Co.* (1873-5), L.R. 8 Ex. 305, L.R. 10 Ex. 195; *Ogle v. Earl Vane* (1867-8), L.R. 2 Q.B. 275, L.R. 3 Q.B. 272.

January 22. GARROW, J.A.:—This is an appeal by the plaintiffs from the judgment at the trial in favour of the defendants of the Chief Justice of the King's Bench. The facts are very fully stated in the judgment of the learned Chief Justice.

The action, as originally framed, was for the conversion of a cargo of wheat, but by amendment an alternative claim for goods sold and delivered was allowed to be set up. And to this the defence is simply payment, a defence which it is conceded must prevail unless the plaintiffs are entitled to add to the written contract a so-called custom or trade usage of the wheat market at Winnipeg whereby it is said that upon such sale by a Winnipeg dealer of wheat there is an implied term which binds the buyer to sell a similar quantity of New York wheat to the original vendor.

The contract, apart from the alleged custom, was made by correspondence, which is set out in the judgment of the learned Chief Justice. The price was apparently to be based upon the price of New York wheat; and it appears in evidence that daily quotations of New York prices for July wheat are available at Winnipeg and other leading grain centres. The price was to be fixed on or before the date of shipment, and payment was to be made by a sight draft for \$25,000 and weekly payments thereafter.

There is, therefore, nothing apparently lacking in the correspondence essential to the creation of a fully expressed agreement providing for the sale of the goods in question at a price to be fixed on or before the date of shipment, upon terms of payment expressly mentioned. The only thing at all open was the price, but that was apparently capable of exact definition by reference to the New York quotations, which prices were to rule.

And it is to this contract that the plaintiffs propose to annex the custom in question.

At the trial counsel for the defendants objected to the reception of the evidence as to the alleged custom, upon the ground that the whole contract between the parties is in writing, and the evidence was received subject to the objection.

In my opinion, the objection was well founded, and the evidence should not have been received.

The rule is, I think, well stated in *Mollett v. Robinson* (1870), L.R. 5 C. P. 646, at p. 656, by Willes, J., thus: "It is also an elementary proposition, that a custom of trade may control the mode of performance of a contract, but cannot change its intrinsic character. It may regulate as extrinsic what is done in the market, where the contract does not provide otherwise. It cannot overrule what is agreed upon between the parties, whether intrinsic or extrinsic." See also the same case in (1872) L.R. 7 C.P. 84 and (1875) L.R. 7 H.L. 802.

And by Bramwell, B., in *Allan v. Sundius* (1862), 1 H. & C. 123, at p. 129: "A custom may be annexed to documents with which it is not inconsistent. . . . If inconsistent or incoherent with the agreement, it cannot be annexed to it." The subject is also very fully discussed in *Brown v. Byrne* (1854), 3 E. & B. 702, 715, and *Humfrey v. Dale* (1857), 7 E. & B. 266, 274, and (1858), E.B. & E. 1004.

The alleged custom would, if established, clearly do more than merely add terms incidental to the performance of the written contract. It would, in effect, result in this, that what is stated as a sale is not in fact a sale at all, but an exchange of May Winnipeg wheat for July New York wheat, and payment of the difference, if any. And this, among its other radical results, would render nugatory the explicit terms of payment contained in the written contract. For, if the vendee is to supply the New York wheat, it seems to follow that he ought not also to pay for the Winnipeg wheat.

The plaintiffs' contention resembles somewhat the contention put forward unsuccessfully in the case of *Phillipps v. Briard* (1856), 1 H. & N. 21. There it was alleged that by the custom of London it was to be implied that upon a ship being chartered and consigned to the consignees' agent in China, it became the right and duty of such agents to procure a return charter or cargo, and to receive the usual commission for so doing, and the action was brought

C. A.  
1907  
NORTHERN  
ELEVATOR  
CO.  
v.  
LAKE  
HURON  
AND  
MANITOBA  
MILLING  
CO.  
Garrow, J.A.

C. A.  
1907  
NORTHERN  
ELEVATOR  
Co.  
v.  
LAKE  
HURON  
AND  
MANITOBA  
MILLING  
Co.  
Garrow, J.A.

for damages because the defendants would not permit the agents to procure the return charter. A demurrer to the declaration was allowed upon the ground, as expressed by Pollock, C.B., that what was sought was not to explain the contract by the custom or to add to it some incidental matter not inconsistent with what was expressed, but to impose upon the party who had entered into one contract, another and a different obligation.

That, I think, very well expresses the situation here, and, adopting it as I do, is in itself sufficient to dispose of this appeal adversely to the plaintiffs.

And in expressing this as my conclusion I do not dissent from the opinion apparently held by the learned Chief Justice that the custom or usage was not proved even as applied to the Winnipeg market, in the case of sales such as the one in question. The custom is certainly an extraordinary one as applied to sales by a dealer to a miller for consumption in his mill, although, perhaps, less extraordinary between dealers in options, where, after all, all that is intended to pass from the one to the other is the difference in price between the present and the future wheat. And it would require to be established by evidence that left no doubt that the custom was well known and in practice universal in the market in question, a condition of things which, notwithstanding the evidence, may, I think, well be doubted.

Mr. Crowe, the plaintiffs' manager, speaks of it as a common and recognized practice of dealing in the grain trade, "universal may be a little strong, because there may be flat trades, but it is trading that is done very generally."

This is as far as he would go, and in his own letters and telegrams leading up to the contract he explicitly offers to make what is called a flat or fixed price for the wheat in question. Mr. Tilt, called by the plaintiffs, speaks of it as a method of dealing "preferable especially to the New York buyers," and as a well-known method of dealing in the grain trade, but he never sold to an Ontario miller on option. Mr. Stuart, also called by the plaintiffs, is a grain dealer residing at Montreal, not at Winnipeg, where Mr. Crowe and Mr. Tilt reside and carry on business, and throughout his evidence, as I understand it, is speaking not of a Winnipeg usage, but of the usage at Montreal in dealings in Manitoba wheat. He says the practice of selling at a price over or under New York

prices is a common one, well known in the trade, and is really an exchange. But he admits that the circumstances of sending an invoice, and of stipulating for payments, as was done in the present instance, are at least puzzling, in a transaction which he calls, and I think properly, if the custom is to be given effect to, an exchange.

That is really all the evidence offered by the plaintiffs to prove the custom, and it is, as I have said before, quite insufficient, in my opinion, to establish it as against these defendants.

The appeal fails and should be dismissed with costs.

C. A  
1907  
NORTHERN  
ELEVATOR  
Co.  
v.  
LAKE  
HURON  
AND  
MANITOBA  
MILLING  
Co.  
Garrow, J.A.

MEREDITH, J.A.:—It is impossible to treat the words “price fixed date shipment or sooner” as entirely meaningless, or as indicating a mere conjecture as to what the defendants would do in a matter in which the plaintiffs had no substantial interest. Telegraphic despatches are too costly to permit of wasted words; and the message indicates even a strict economy of material and necessary words. The words are very plain and easily understood; and afford no sort of indication that they were not intended to have any effect, or any bearing upon the contract which the parties were entering into, and which they concluded. The defendants’ answer to the plaintiffs’ offer was just as much part of the bargain as the offer was; and is just as much to be taken into account in considering what the actual bargain was—what the meaning of the parties as expressed in the writing was. The words which the plaintiffs desire to brush aside are in number six out of a total of fourteen; and are such, and so stated, that they could not have escaped the observation of any one reading the telegram. The plaintiffs’ letters of the 22nd May shew that they were willing to sell either at a price to be fixed as upon New York July options or a day’s closing price in New York, either course being usual; and so there seems to me to have been no excuse for treating as if they had no part in the contract the words of the telegram naming the day of shipment as a date fixing the price.

But, leaving out of consideration the acceptance, the offer itself shews that an ordinary New York July option could not have been really meant, for upon such an option the price might have remained unfixed until the last day of July, though the terms of the agreement required payment of \$25,000 cash and the balance in three weekly instalments, all of which fell due and were payable in



C. A.  
1907

NORTHERN  
ELEVATOR  
Co.

v.

LAKE  
HURON  
AND  
MANITOBA  
MILLING  
Co.

Meredith, J.A.

the months of May and June. This alone would seem to put the July option, in its usual sense, quite out of applicability to the transaction. The defendants' acceptance, as well as the plaintiffs' offer, each, was therefore a clear departure from the July option method of fixing the price; and a clear modification of the course of business to be followed on a sale or purchase of such an option, and it worked no injustice or inconvenience upon either party. If the plaintiffs desired to "protect" themselves, or to "hedge," or speculate in any manner, that was quite open to them, and might have been indulged in to any extent on the ultimate day, if the defendants had not sooner fixed it, in which case the earlier day fixed would have given like opportunity. It is difficult to see what the plaintiffs lost by the defendants reducing the time within which they might fix the price from the last day of July to the 29th May.

That the price was to be fixed by New York prices on the day of shipment, if not sooner fixed, was the defendants' intention, is very clearly shewn by their subsequent conduct. If it were not the plaintiffs' understanding of the important words, then, at the most in their favour, the parties were never at one, and there was no contract. In that case the plaintiffs would be entitled to the value of the wheat at the time of the sale, and that the defendants have paid; or, at all events, there is no sort of evidence that it was greater than the amount they have paid.

But, in my opinion, the defendants not having sooner fixed the price, it must be, under the contract, fixed by the New York price on the day of shipment; and, as the defendants have paid the highest price of that day, the action was rightly dismissed.

Moss, C.J.O., and MACLAREN, J.A., concurred.

E. B. B.

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## [IN THE COURT OF APPEAL.]

STEPHENS V. TORONTO R.W. CO.

C. A

1907

Feb. 5

*Costs—Scale of—Payment of Money into Court with Defence—Acceptance in Satisfaction—Amount within Jurisdiction of Inferior Court—Con. Rules 425, 1132, 1133.*

Where money is paid into Court by the defendant with his defence, and taken out by the plaintiff in satisfaction of all the causes of action, the plaintiff is entitled to tax his costs on the scale of the Court in which the action is brought, even where the amount paid in and accepted is within the competence of an inferior Court.

Construction of Con. Rules 425, 1132, 1133.

*Babcock v. Standish* (1900), 19 P.R. 195, and *McSheffrey v. Lanagan* (1887), 20 L.R. Ir. 528, approved.

Order of a Divisional Court affirmed.

APPEAL by the defendants (by leave) from the order of a Divisional Court affirming an order of a Judge in Chambers dismissing an appeal from the ruling of one of the taxing officers, upon taxation of the plaintiff's costs of the action, that the plaintiff was entitled to costs upon the scale of the High Court.

The action was brought in the High Court to recover \$1,000 damages for personal injuries sustained by the plaintiff by reason of the negligence of the defendants, as alleged.

The defendants pleaded "not guilty by statute," and paid into Court \$150, saying that that sum was sufficient to answer the plaintiff's damages, if she was entitled to damages.

The plaintiff took out the \$150 in satisfaction of all the causes of action, and brought in her bill of costs, which was taxed on the High Court scale.

Con. Rule 425: "When the plaintiff takes out money in satisfaction of all the causes of action he may tax his costs of the action and sign judgment therefor, unless the defendant pays them within forty-eight hours after taxation."

Con. Rule 1132: "Where an action of the proper competence of a county court is brought in the High Court . . . and the Judge makes no order to the contrary, the plaintiff shall recover only county court costs. . . . and the defendant shall be entitled to tax his costs of suit as between solicitor and client, and so much thereof as exceeds the taxable costs of defence which would have been incurred in the county court . . . shall, on entering judgment, be set off and allowed . . . ."

C. A.

1907

STEPHENS

v.

TORONTO

R.W.Co.

Con. Rule 1133: "In every case in which judgment is entered without trial, or the decision of a Court or a Judge, or order as to the costs, and where the amount of, or relief awarded by, the judgment, *prima facie*, appears to be within the jurisdiction of an inferior court, the taxing officer shall not tax full costs of the High Court, without proof on affidavit to his satisfaction that the action was properly instituted therein; and if properly within the competence of the county or division court, then the taxation shall be on the scale of fees in such court."

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A., on the 24th January, 1907.

*D. L. McCarthy*, for the defendants. The costs should be taxed on the scale appropriate to the amount recovered, which in this case is the county court scale. If the plaintiff is entitled under Con. Rule 425 to tax costs on the High Court scale, it is an encouragement to plaintiffs to bring actions in the High Court. I rely on *Chick v. Toronto Electric Light Co.* (1887), 12 P.R. 58, which should be approved in preference to *Babcock v. Standish* (1900), 19 P.R. 195. I rely also on Con. Rules 1132 and 1133; *Andrews v. City of London* (1887), 12 P.R. 44; *McKelvey v. Chilman* (1903), 5 O.L.R. 263; *Ireland v. Pitcher* (1886), 11 P.R. 403; *Soloman v. Mulliner*, [1901] 1 K.B. 76.

*R. H. Parmenter*, for the plaintiff, cited *McSheffrey v. Lanagan* (1887), 20 L.R.Ir. 528; *Holmsted & Langton's Ontario Judicature Act and Rules*, 3rd ed., pp. 626, 1358.

February 5. OSLER, J.A.:—This was an action to recover damages for injuries caused by the defendants' negligence. The defendants paid into Court \$150 in respect of all the causes of action, and the plaintiff took the money out of Court in satisfaction of the same, and taxed his costs, against objection, on the scale of the High Court. The ruling of the taxing officer was affirmed successively by a Judge and by a Divisional Court. The defendants appeal, contending that the view of Rose, J., in *Chick v. Toronto Electric Light Co.*, 12 P.R. 58, should be followed in preference to that expressed by a Divisional Court in *Babcock v. Standish*, 19 P.R. 195, inasmuch as the amount paid into Court, and accepted in satisfaction, shewed the cause of action to have been one within the jurisdiction of the county court.

I do not think it necessary to discuss the cases referred to, or the question whether the construction of the Rules which the plaintiff contends for should be rejected because it tends to promote litigation by encouraging plaintiffs to make extravagant claims, or should be adopted because it encourages compromises and tends to put an end to litigation. Upon the plain language of the Rules, I think *Babcock v. Standish* was well decided.

Rule 425 expressly provides that where the plaintiff takes out money in satisfaction of all the causes of action, he may tax his costs of the action and sign judgment therefor, unless the defendant pays them within 48 hours after taxation.

If there is no Rule of Court which limits the scale of costs taxable in that particular case, the plaintiff must be entitled to costs on the ordinary scale applicable to the Court in which the action is brought, for there is nothing in Rule 425 which restricts him to anything less.

The defendants point to Rule 1132. That Rule, however, is clearly confined to cases in which judgment is entered for the plaintiff after a trial, whether by a Judge or by a jury, and for some amount awarded by the judgment; and Rule 1133, which they also rely upon, only provides for cases in which judgment is entered without a trial, where the amount of or the relief awarded by the judgment *prima facie* appears to be within the jurisdiction of an inferior court. But where money is paid into Court and accepted and taken out of Court in satisfaction, under Rules 419-425, there is no judgment for anything but the costs, and not even for them if the defendant pays them within 48 hours after taxation. The amount paid in is offered in satisfaction and accepted in satisfaction of the demand sued for, and the settlement and disposition of the action thus rests, not upon the judgment of the Court, but upon the agreement of the parties, and Rule 425 is the only one which provides for the costs recoverable in that particular case.

Order XXX., Rule 4, of the Irish Judicature Act, is similar in terms to our Rule 425, and in *McSheffrey v. Lanagan*, 20 L.R.Ir. 528, the question now under consideration was dealt with by the Court of Appeal and decided as we now decide it.

The case invites no further observations of any kind, and the appeal must, therefore, be dismissed with costs.

C. A.

1907

STEPHENS

TORONTO  
R.W.Co.

Osler, J.A.



C. A.

1907

STEPHENS

v.

TORONTO

R.W.Co.

Meredith, J.A.

MOSS, C.J.O., GARROW and MACLAREN, JJ.A., concurred.

MEREDITH, J.A.:—This lengthened litigation began in a somewhat bold attempt to change the settled practice of the High Court of Justice, and of the county courts, respecting a matter of no very great moment, by means of a mere Chambers motion; and I desire, in the first place, to deprecate attempts to have the settled practice of those Courts unsettled and re-settled in this Court. The subject is one with which the Judges of those Courts must be familiar; and thus better able to deal with: so that there must be very seldom good reason for giving effect to such an appeal as this; and the less so, having regard to the ease and frequency with which the Rules of practice can be and have been changed, to prevent abuses, and to make them in all other respects more perfect. In order to ensure a needed amendment it ought not to be, and has not been, necessary to go to the expense and exertion of carrying a motion from the Master in Chambers to a Judge in Chambers, and from a Judge in Chambers to a Divisional Court, and thence to this Court. It is a case of wasted energy.

Nor can I at all agree in the contention that the practice found fault with is really wide open, except perhaps in theory, to abuses. The same Rule has been in force since the Common Law Procedure Act, 1856, and before that under the Rules of Court of Easter Term 5 Vict., and there has been no outcry against it. In the many hundreds of suggestions for alterations of the Rules, and the many hundreds of changes made in them—in some of which the Rules were wholly remodelled with great care, after seeking suggestions in all proper quarters—it would be strange that nothing was done in this respect, if there were any sort of real need for it.

Take this very case for an instance; what injustice is done? Before action brought the defendants had ample time for settling the plaintiff's claim, or tendering any sum they saw fit in satisfaction of it: but nothing in that way was done. After an examination of the plaintiff, made by a surgeon under an order of the Court in the presence of the plaintiff's surgeon, the conclusion was reached that the plaintiff had permanently recovered from the effect of the injury caused by the defendants; then, instead of effecting an amicable settlement, the defendants, with a knowledge of the Rule on the subject and the well settled practice under it, paid the money

into Court. It may be that, but for such Rule and practice, the plaintiff would not have accepted the amount paid into Court in satisfaction of her claim. The equity of the thing can hardly be said to be with the appellants.

The imaginary cases, which Mr. McCarthy invoked, seem to me to be extremely improbable ones. After an experience, now going on towards a half a century, I am unaware of even one such. Why should an action be brought in a higher court solely for the purpose of getting the very few more dollars in costs under this practice? How can a plaintiff foretell that money will be paid into Court? The game would hardly be worth the candle, even if the gamester were sure of success. And, beside all this, the plaintiff would have in his hand a ready remedy; he could go on to trial and get the benefit of Rule 1132, if not better terms as to costs in the exercise of the trial Judge's discretion upon the question; if unable to tender the amount, intended to be paid into Court, before action.

I would dismiss this appeal on the ground before mentioned: that this Court ought not to interfere with the settled practice of the High Court. But, if we are to review the decision of the Divisional Court—*Babcock v. Standish*, 19 P.R. 195—I have no hesitation in expressing my concurrence with that Court in the conclusion reached.

Rule 425 gave the plaintiff the right to "*tax his costs of the action.*" Costs of the action must mean costs of the court in which the action is brought, unless somewhere otherwise provided. There is nothing otherwise provided. Why, therefore, should the costs in a High Court action be taxed as if a county court action, any more than that High Court costs should be taxed in an action in the county court?

Rules 1132 and 1133 are inapplicable: Rule 1132 deals with actions which have been tried; Rule 1133 with cases in which judgment is entered. In order to give effect to the appellants' contention, words must be read into Rule 425 making Rule 1133 applicable to such a case as this.

My memory can recall no instance of any departure, in practice, from the rule given effect to in the case of *Babcock v. Standish*; and, upon having inquiry made of the taxing officer, find that he too is unable to recall any instance. An attempt to change the practice,

C. A.

1907

STEPHENS

v.

TORONTO

R. W. Co.

Meredith, J. A.

C. A.  
1907  
STEPHENS  
v.  
TORONTO  
R.W.Co.  
Meredith, J.A.

by motion in Chambers, was made in the case of *Chick v. Toronto Electric Light Co.*, 12 P.R. 58, and was successful, to the extent of the order made in that case. The learned Judge—apparently upon what he thought the practice should be rather than what it was, and upon the practice in England—ruled that the costs in that case should be taxed upon the county court scale: but I am quite unaware of that ruling having ever changed the practice anywhere, and no one has said that it did; whilst the practice in England—whatever it may have been—was based upon the County Courts Act, 1888, sec. 116, which is different in its terms from Rules 1132 and 1133; the rule there established being based upon the amount recovered.

A case in point is that of *McSheffrey v. Lanagan*, 20 L.R. Ir. 528. A hard case but one in which the Irish Court of Appeal held to the established practice.

The English Rule now contains the words “unless the Court or a Judge shall otherwise order,” thus limiting a plaintiff’s right to costs on taking out money paid into court, in satisfaction of his claim.

Whether the addition of such words to Rule 425 would be really a beneficial amendment of it, may be arguable. If the result would be a fierce fight, with affidavits, in each case, a fight which would perhaps double or treble the costs, it might create a greater evil than that which it would be intended to remedy. Whether Rule 1133 should or should not be made applicable to Rule 425 is quite another question.

I would dismiss the appeal.

E. B. B.

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## [IN THE COURT OF APPEAL.]

PRESTON V. TORONTO RAILWAY COMPANY.

C. A.

1906

Nov. 3

*Negligence—Street Railway—Piling Snow at Side of Track—Contributory Negligence—Plaintiff Putting Himself in Peril.*

An appeal by defendants from the judgment of the Divisional Court, reported 11 O.L.R. 56, was dismissed: MEREDITH, J.A., dissenting.

THIS was an appeal by the defendants from the judgment of a Divisional Court reported 11 O.L.R. 56.

The appeal was argued on the 25th and 26th of April, 1906, before MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.

Wallace Nesbitt K.C., and D. L. McCarthy, for the appeal. There was no evidence of the rapid rate of the approaching car as mentioned in the judgment of the Court below, nor that the gong was not rung even if the plaintiff did not hear it, and the case should not be left to a jury to draw inferences as to what he might have done if he had heard it: *Ellis v. The Great Western R.W. Co.* (1874), L.R. 9 C.P. 551; *Skelton v. London and North-Western R.W. Co.* (1867), L.R. 2 C.P. 631, at p. 636, *per* Willes, J. The plaintiff's conduct was reckless: *Siner v. The Great Western R.W. Co.* (1869), L.R. 4 Ex. 117; *Callender v. Carleton Iron Co., Ltd.* (1903), 9 Times L.R. 646; *The Dominion Iron and Steel Co. v. Oliver* (1904), 35 S.C.R. 517; *O'Hearn v. Town of Port Arthur* (1902), 4 O.L.R. 209; *Phillips v. The Grand Trunk Railway of Canada* (1900), 1 O.L.R. 28; *Danger v. London Street R.W. Co.* (1899), 30 O.R. 493. The defendants were not negligent. We also refer to *Hiddle v. National Fire and Marine Ins. Co. of New Zealand*, [1896] A.C. 375; *Ibo Syndicate, Ltd., v. Wyler* (1902), 87 L.T.N.S. 83; *Follet v. Toronto Street Railway Company* (1888), 15 A.R. 346, *per* Hagarty, C.J.O.; *Landrigan v. The Brooklyn Heights Railroad Co.* (1897), 23 App. Div. Sup. Ct. N. Y. (Hun) 43; *Metcalf v. St. Paul City Ry. Co.* (1900), 84 N.W.R. 633, at p. 634.

*Shirley Denison*, *contra*. The plaintiff had the right to ride on the track, which should have been clear, but the defendants had banked



C.A.  
1906  
PRESTON  
v.  
TORONTO  
R.W.Co.

it up with snow and so created the situation of danger. One track was no safer than the other, so he did not leave a place of safety and go into a place of danger. The motorman was inexperienced. If anything was omitted which should have been done and might have contributed to the accident, the case should have gone to the jury. There was too much speed and no warning. I refer to *Daldry v. Toronto R.W. Co.* (1905), 6 O.W.R. 62; *Wanless v. The North Eastern R.W.Co.* (1871), L.R. 6 Q.B. 481; (1874), 7 H.L. 12; *Smith v. Niagara and St. Catharines Railway Company* (1904), 9 O.L.R. 158.

*Nesbitt*, in reply.

November 3. Moss, C.J.O.:—In my opinion this appeal fails and should be dismissed.

The plaintiff was lawfully using the part of the highway on which he was proceeding following the south-bound car down Yonge street towards his destination. He was also entitled to use the part of the highway between the tracks on the east side provided he did not unnecessarily interfere with the traffic upon that part or knowingly or recklessly expose himself to imminent and apparent danger by going upon it.

According to the evidence, he was following the south-bound car, keeping at a distance of fifteen or twenty feet behind it, until it came to a stand-still on the north side of Wellington street. As it did not move on by the time he had arrived at a distance of about four feet from it, it became necessary for him to avoid it by turning either to the right or left. His way to the right was obstructed by a ridge of snow at the west side of the track about eight or ten inches in height. Deeming it impossible to force his bicycle over this obstruction, he looked to the left or east side of the car. He saw nothing and heard no sound to indicate that there was any approaching car or other traffic to obstruct his way on the east track, and he turned to go upon it. As a matter of fact there was a car crossing Wellington street from the south going at a rapid pace, and it was within ten feet of him when he came on the devil strip. He made an effort to avoid a collision by turning straight across the track and throwing himself off, but failed and was struck and injured.

The learned Chancellor, before whom the case was tried, did not deal with the question whether there was evidence to submit to the jury of negligence on the part of the defendants, except on one point, to be noticed presently, but held that the plaintiff should not have turned in upon the east track, but should have turned to the right, and because he did not do so, he was guilty of negligence which occasioned the injury; in short, that the plaintiff was the author of his own injury.

He was also of opinion that there was no obligation on the part of the defendants or their motorman to sound the gong when crossing the street or approaching another car and that failure to do so was not negligence. But in this he overlooked the testimony of the defendants' road-master, that there is a rule requiring the ringing of the gong when passing cars. The omission to give the customary signal was a factor in support of the charge of negligence, which should not have been withdrawn from the jury: *per* Hagarty, C.J., in *Beckett v. The Grand Trunk R.W. Co.* (1886), 13 A.R. 174, at p. 183. There was, in my opinion, evidence upon which the jury might reasonably find that the gong was not sounded and that the car was moving at a rapid rate.

Then the question whether the plaintiff had acted reasonably under the circumstances, or whether he had by his own negligence and want of proper care and caution either brought the accident upon himself or contributed to it, was for the jury.

I am not prepared to hold, nor do I think the authorities compel me to hold, that it is *per se* negligent, reckless or unreasonable conduct for the rider of a bicycle, riding between the rails of one track of the railway to turn upon the space between the rails of the other track when he finds his way on the first obstructed. It must be for a jury to decide whether under all the circumstances he acted in a reasonable manner in so doing. And in my judgment the view taken by the Divisional Court was right and should be affirmed.

Appeal dismissed with costs.

OSLER, J.A.:—The judgment of the Divisional Court directing a new trial, must, I think, be affirmed.

There is evidence that the driver of the north-bound car did not sound his gong when about to pass the stationary south-bound car behind which the plaintiff was riding.

C. A.  
1906  
PRESTON  
v.  
TORONTO  
R.W.Co.  
Moss, C.J.O.

C. A.  
1906

PRESTON  
v.  
TORONTO  
R.W.Co.  
Osler, J.A.

The latter does not say that he was listening for a gong. He says he did not hear one. He admits, in answer to a question so framed, that it was possible that a gong might have been rung and that in his excitement he did not hear it, but he says, nevertheless, that he is pretty sure that it did not ring. And he is shewn to have been in such a situation—so close behind the standing car—that he would probably have heard it if it had been rung: *The Directors, etc., of the Dublin, Wicklow and Wexford R.W. Co. v. Slaterry* (1878), 3 App. Cas. 1135, at p. 1183; and *Basso v. Grand Trunk R.W. Co.*, recently decided in this court: 6 O.W.R., p. 893.

Upon the question of fact, therefore, there is evidence from which the jury might infer that the warning was not given, and if so, they might also infer negligence on the defendants' part in omitting a precaution, of which their own rule affirms the necessity, at a situation specially dangerous for persons desirous of passing behind a standing car to the further track or to the other side of the street, the view of which is obstructed by the car. The case differs from *Skelton v. London and North Western R.W. Co.*, L.R. 2 C.P. 631, where a precaution generally, but not always, observed by the defendants at a certain railway crossing, and the omission of which on the particular occasion was relied upon as evidence of negligence, was not only wholly voluntary, but the crossing was one at which there was no unusual danger and there was nothing to oblige the defendants to take extra precautions.

The other question in the case, viz., whether the plaintiff was guilty of contributory negligence which really caused his injury, is perhaps more arguable, but on the whole I am of opinion that this also was a question which could not properly have been withdrawn from the jury. The plaintiff was lawfully using the highway when he followed the car on the track along which it was going and on which it came to a stand-still a short distance from him. It is true the accident happened in broad daylight, but the plaintiff's view of the north-bound car was then obstructed by the other car. There was a substantial difficulty caused by the snow bank in the way of his turning out and passing to the right as he certainly should otherwise have done. Under all the circumstances—the obstruction of the view and the question of fact as to the warning being in dispute, or assumed against the defendants—it was for the jury to determine whether the plaintiff's act in turning out

across the easterly track was a negligent one which disentitled him to recover.

The question was whether the accident was attributable to the absence of the warning of the approach of the north-bound car or to the want of reasonable care on the plaintiff's part. The fact of warning or omission to give warning is necessarily involved in the consideration of the reasonableness of the plaintiff's conduct, and this fact, and the inferences to be drawn in whatever way it may be found, fall, as I have said, to the jury, and not to the Court to decide.

The appeal should therefore be dismissed.

GARROW and MACLAREN, JJ.A., concurred in the judgment of the Chief Justice.

MEREDITH, J.A.:—When the question which arose in this case is asked in an abstract manner, when it is asked whether it would be prudent for one, in all the surrounding circumstances of danger detailed in the evidence, to practically blindfold himself and then ride into the teeth of the traffic with nothing whatever to gain except, at the most, a few seconds of time, worth to him but a small fraction of one cent, there can be but one answer, that it would be reckless folly; it is only when we have to apply it to a concrete case, and are brought face to face with a poor man badly wounded in a collision with a car of a supposedly wealthy and certainly unpopular corporation, to which pounds are less than pence are to the poor man, that we begin to blindfold ourselves and to cast about for some means by which the rich may be made to compensate the poor for the injury; a process not confined to juries, but equally insidious with Judges, though greater experience in the trial of such cases ought to make them more guardful against bending right to meet sympathy.

The plaintiff was, in the depth of mid-winter, and possibly numbed by cold—certainly hampered by winter clothing—riding a borrowed bicycle, with which he was not familiar, and was so riding in the heart of the business centre of the city of Toronto, in a street double-tracked by the electric railway company, and over which most of the cars of the whole city passed, so that the "head-way" between them is said to have been not many seconds.

C. A.

1906

PRESTON

v.

TORONTO

R.W.Co.

Osler, J.A.



C. A.

1906

PRESTON

v.

TORONTO

R. W. Co.

Meredith, J. A.

The snow upon the streets was so heavy that bicycles could be ridden only over that part of it between the rails of the tracks, and there only because the railway company, for their own purposes only, kept them swept to enable their cars to pass up and down unobstructed by snow or ice. According to the plaintiff's testimony the snow thus swept from the tracks lay in a bank on each side, so that one riding on a bicycle upon the tracks was in a trough from which he could not escape without dismounting and carrying or dragging the bicycle over one of them.

In these circumstances the plaintiff entered upon the down-track, following the traffic at some considerable distance from the car in front of him; that car stopped to let down or take up a passenger, and the plaintiff, instead of looking when he might have seen down the other track, or crossing to it when he might for the moment safely have done so, pursued his course on the down-track until immediately behind the car in front of him, and until his view down the up-track was so obstructed by that car that he could see only a very short distance down it, was indeed practically blindfolded, by his own act, to the danger he was about to encounter.

Instead of remaining in that position, as he should have done, for the very few seconds until the car would be again in motion and he could follow it again, he, without taking any precaution, rode into the up-track, and then saw a rapidly approaching car so near to him that he had no means of escape. To the left of him was the mound of snow forming the left-hand boundary of the trough, to the right was the car whose shelter he had just left, and in front of him was the fast approaching car on the up-track. Serious injury was almost inevitable. If he could save himself by throwing himself from the bicycle to the mound of snow beyond the track, the bicycle must remain and prove a possible source of danger to the car and all those upon it. But that which was probable happened, the plaintiff and the bicycle were injured, he very fortunately, much less than seemed likely.

To many, it might seem indiscreet of anyone, even upon his own familiar bicycle, to employ such a mode of locomotion in such a thoroughfare at such a time of the year, when a slip upon the ice or a jolt against frozen snow or other frozen substance might dislodge the rider in a place of great danger; and the more so, to proceed along the tracks, subject to the danger from moving cars,

and also from the "deadly live wire," always a source of at least some little unavoidable danger—avoidable only by keeping off the track. But these were small things in comparison with the plaintiff's want of care in following the car in front of him, until it, for all practicable purposes, completely obscured his view, and then passing from a place of safety into a place of known great danger without the least need for so doing, and with substantially nothing to gain by it; risking limb and life to gain at the most but a small fraction of one cent. Being able to see a part of the car's length only was practically no better than not being able to see at all beyond the rear end of it, for a car in sight—within the twenty or thirty feet—would be of little, if any, danger; it would, at the rate at which the car in question is said to have been going, have been beside, if it had not passed, the plaintiff before he had set his bicycle in motion and reached the up-track, and at the most would probably have but brushed him aside. It was the car which was much further away, that was the source of his danger, and against which he ought to have taken great care under any circumstances, and the more so, when he was going into his wrong side of the road, against the current of the traffic, in a place where it was greatest.

Can it be doubted that, if instead of running into a car going in the proper direction, he had run into and injured another person going in that direction upon a bicycle, he would be answerable for actionable negligence? And if anyone upon the car with which he collided had been injured by the collision, would not such person have a good cause of action against him? If he meant to pass to the up-track at all he should have looked when he could have seen, and should have passed over to it when he safely might, instead of following the stopping car until so close to it that he had practically blindfolded himself to his danger. Not having done so, and having of his own choice and motion put himself in such a position, can anyone seriously say that it was not an act of great imprudence, and one which none but the reckless or foolhardy would perform, to pass from a place of safety into a place of great danger in the face of and against the rights of traffic? His intention, eventually told by himself, was to dodge the cars, to get ahead of those which obstructed his speed, by passing around them on the up-track and then passing into the down-track again, a

C A.

1906

PRESTON

v.

TORONTO

R.W.Co.

Meredith, J.A.

C. A.  
1906

PRESTON  
v.  
TORONTO  
R. W. Co.

Meredith, J. A.

somewhat dangerous practice in the best of weather and under most favourable circumstances.

It was suggested that the plaintiff could not remain where he was, but had to keep moving, and that, as the snow mound prevented him passing to the right side of the car and with the traffic, he was forced into the place of danger and of his injury; but there is no sort of foundation for the suggestion. If he were so inexperienced a driver, or if his borrowed bicycle fitted him so ill, that he was unable to remain upon it for the moment or so before he could move on again, it was a very simple thing, and his duty to himself, to have dismounted. It was his duty to no one to risk limb and life to avoid the trifling exertion of dismounting and mounting again, or even that, plus the gain of a fraction of one cent in time or in money.

No warning of any character seems to have been given by the plaintiff of his intention to pass the car, by ringing a bell or otherwise. It may be, that such warning might have been fruitless, but it is also possible that some one on the platform of the stopping car, or upon the street, might, having seen the approaching car, or even without seeing it, have given warning of the danger—have awakened him to a sense of his folly.

The statute provides that in the ordinary case of a bicycle overtaking any vehicle drawn by horses, and the rider, desiring to pass on the proper side, shall give audible warning of his approach before attempting to pass, and that is but a law which practical experience would dictate in the absence of any such enactment as well as with it.

The case is one in which the plaintiff has made it manifest, that by the exercise of ordinary care he would have avoided his injury, and so was rightly non-suited, whether or not, there was any reasonable evidence of actionable negligence on the part of the defendants.

The cases lend no great aid. It is seldom that any two are quite alike even in substance. Detached expressions can, of course, be cited to support almost any contention. But they are apt to be only misleading, until the context is read and the nature and the circumstances of the case in which they were used are thoroughly understood. It is sometimes said, that texts can be found to support almost any rascality if divorced from their context and misapplied.

Observations borrowed from the books are quite as bendable to many uses.

The suggestion that the plaintiff was put in any imminent peril, or even in any dilemma, by the act of the defendants, has nothing substantial to support it. In stopping the car to let down or take up a passenger they were doing a lawful and proper act of constant occurrence. Behind that car, he was quite safe from it and from all cars on the other track. The suggestion that he might have feared that the car in front of him would "back up" is quite too far-fetched; it receives no sort of encouragement or countenance from the plaintiff throughout his testimony. Back up, what for? To crash into the next rapidly following car? Its business was ahead and it was attending actively and strictly to that business. But if that were so, the less excuse there would be for coming so close to that car, for not passing over to the other track when he safely might, when he could see a long distance down it and would be far removed from any danger of sudden backing upon him. The plaintiff was put in danger by his own voluntary act, and that act put him in such great danger, that he had no choice of methods of escape, but was immediately run down.

Then it was said, that the plaintiff had a right to act as he did upon the supposition that the company would sound the gong of the on-coming car; but, in the first place, he did not so act, and indeed could not have done so, for he admits that it may have been possible for the gong to have been sounded, without being heard by him; nor can it be the law, that one can rightly do an incautious thing on the faith of another doing only that which is cautious. A vast majority of injuries are caused by the wrongful act or omission of some one. Common sense and self-preservation require that reasonable care be taken to avoid such injuries, as well as all others. Sane men do not go through life in a fool's paradise, depending upon the proper conduct in all things of their fellowmen. The defendants' failure to sound the gong would not turn the plaintiff's imprudence into prudence. It was great imprudence, recklessness, to pass from a place of safety, without any sort of substantial reason, against the current of traffic, in such a place, and into known great danger under the most unfavourable circumstances, caused by the season of the year and the ice and the snow.

C. A.

1906

PRESTON

v.

TORONTO

R.W.Co.

Meredith J.A.



C. A.  
1906  
PRESTON  
v.  
TORONTO  
R.W.Co.  
Meredith, J.A.

The sounding of a gong in noisy Yonge street has a very different effect from sounding a gong in the restful ears of any Court. We must try to put ourselves in the street, where too much ringing of gongs may be more distracting than helpful; buildings and other things deflect sound waves. To the plaintiff, if he heard, it might have been difficult to know whether it was the gong of the car in front of him starting on again or possibly one behind him; but in any case, as he testified and as anyone would know without his testimony, the gong of the car with which he collided might have been sounded without his hearing it. A man with a bicycle to manage in such a place at such a season of the year has his attention set more upon his work. It might have rung without being heard by him, so how can not hearing it be any kind of an excuse for recklessness?

There seems to be yet in some minds a lingering notion that the defence of contributory negligence is something peculiar, something different, from all other questions; that it must in every case and under any circumstances be a question for the jury only. At one time there seems to have been a similar notion as to all questions of negligence. But there is no sort of sound foundation for any such notion. These and all other questions are on precisely the same footing on a motion for non-suit. It is for the Court to say whether there is any reasonable evidence to go to the jury in every case and upon every question, and if not to dispose of it without any intervention of the jury; and that is very clearly so, when, as in this case, the plaintiff himself shews that he has not a good cause of action.

The trial Judge's ruling upon this question was, in my opinion, entirely right upon principle and upon the cases which were binding upon him and upon the Divisional Court, though not upon this Court: see *Logan v. London Street Railway Co.*, not reported; *Phillips v. The Grand Trunk Railway of Canada*, 1 O.L.R. 28; and *Gallinger v. The Toronto Railway* (1904), 8 O.L.R. 698.

The other question, whether there was any reasonable evidence of negligence on the part of the defendants, causing the plaintiff's injury, is to me a more difficult one, and is one, upon which it is not necessary that I should express any opinion, having no doubt that the plaintiff's action fails on the other ground. But it should

be observed that the plaintiff's action was really based upon negligence in leaving the snow piled upon each side of the tracks so that he could not pass to the right, and having passed to the left and run into danger could not escape on that side. Failing in this, a half-hearted effort was made to establish a case on the other ground, for which the plaintiff does not seem to have been prepared, and in which he does not seem to have had any great reliance. And it must be also observed that to find negligence in not sounding the gong is to over-rule the case of *Gallinger v. The Toronto Railway*, 8 O.L.R. 698.

I would allow the appeal and restore the judgment directed to be entered at the trial.

G. A. B.

C. A.

1906

PRESTON

v.

TORONTO

R.W.Co.

Meredith, J.A.

[IN CHAMBERS.]

RE HART ESTATE.

1907

Feb. 14

*Devolution of Estates Act—Administrator, Only Adult Interested in Real Estate—Consent—Registration of Caution.*

An intestate owning real estate left her surviving her husband and two infant children. Letters of administration were granted to the husband, who registered a caution under sub-sec. 5, sec. 14, of the Devolution of Estates Act, R.S.O. 1897, ch. 127, and with the consent of the Official Guardian sold the real estate. On an application under Con. Rule 972:—

*Held*, that although administrator, he being the only adult interested in the real estate, was not deprived of his right to consent, and that his application to register the caution was sufficient evidence of such consent.

THIS was an application, under Con. Rule 972, for a direction in respect to the real estate belonging to an intestate and sold under the Devolution of Estates Act, which was argued in Chambers on the 29th January, 1907, before FALCONBRIDGE, C.J.K.B., in whose judgment the facts appear.

W. A. Baird, for the applicant.

F. W. Harcourt, Official Guardian, for the infants.

Falconbridge,  
C.J.

1907

RE  
HART  
ESTATE.

February 14. FALCONBRIDGE, C.J.:—The intestate died 12th February, 1899, entitled to real estate, leaving her surviving, her husband, Emerson G. Hart, and two infant children. Letters of administration were issued to the husband.

He registered a caution in March, 1904, and sold the real estate with the consent of the Official Guardian under the Devolution of Estates Act.

The question submitted to me under Rule 972 is whether the administrator, being the only adult interested in the property, could register a caution without an order from a High Court Judge or county court Judge or the certificate of the Official Guardian, as required by sec. 14, sub-sec. 5, of the Devolution of Estates Act, R.S.O. 1897, ch. 127.

Under sub-sec. 3 of the said section, the consent in writing of any adult devisees or heirs is sufficient to permit a caution to be registered. In order to deprive a person of a right conferred on him by statute there must be express words. I find nothing in the statute depriving an adult of the right to consent because he occupies the position of administrator and is the only adult interested, and the fact that he applies to register the caution is, in my opinion, sufficient evidence of his consent.

When the administrator is the only adult interested in the estate and there are infant beneficiaries, the consent of the Official Guardian is required before a sale can be effected, and thus the estate is sufficiently protected.

G. A. B.

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[MULOCK, C.J., Ex. D.]

GYORGY (RE ANDREW MUSZKULAKI ESTATE)

v.

DAWSON.

GYORGY (RE JOSEPH GABOR ESTATE)

v.

DAWSON.

1906

Dec. 12.

*Negligence—Master and Servant—Death of Servant—Foreigner—Action for Benefit of—Right to Recover Damages.*

The administrator within this Province of a foreigner who was killed in an accident here through his employer's negligence is entitled, under the amendment to the Fatal Accidents Act, as embodied in sec. 2 of the R.S.O. 1897, ch. 166, to maintain an action on behalf of the deceased's family, foreigners residing out of Canada, for the recovery of damages sustained by reason of his death.

THESE were actions brought to recover damages by reason of an accident resulting in the death of Andrew Muszkulaki and Joseph Gabor, caused through the alleged negligence of the defendants, tried together before MULOCK, C.J. Ex.D., and a jury, at Welland, on November 19, 1906.

The actions were brought under the "Act respecting Compensation to the Families of Persons killed by Accident, and in duels," by one Gyorgy, who had taken out letters of administration to the estate of the two deceased persons, for the benefit of their families.

*F. W. Griffiths* and *W. H. McGuire*, for the plaintiffs.

*F. W. Hill* and *T. F. Battle*, for the defendants.

Nonsuits were moved for in each of the actions on the ground that they were not maintainable as the deceased were aliens, and that the beneficiaries were also aliens residing abroad. Subject thereto the cases were submitted to the jury, who found for the plaintiffs, with damages for \$200 and \$100 respectively.

The learned Chief Justice reserved his decision, and subsequently delivered the following judgment.

December 12. MULOCK, C.J.:—These two actions were tried together with a jury at Welland and resulted, the former in a



Mulock, C.J.

1906

GEORGY

v.

DAWSON

verdict for the plaintiff of \$200, and the latter in a verdict for the plaintiff for \$100. Thereupon counsel for the defendants moved to dismiss the actions, because the deceased were aliens and the beneficiaries are aliens resident abroad.

The facts bearing on the questions thus raised are as follows:

Andrew Muszkulaki and Joseph Gabor were at the time of the accident, hereinafter mentioned, citizens of Hungary, but resident in the county of Welland, and were employed by the defendants to work in a wheel-pit on the Ontario side of the Niagara river. When being lowered by a bucket into the pit, a chain, which supported one side of it, became unhooked, whereby they were thrown from the bucket and instantly killed. At the time of the accident Muszkulaki was a married man with one child, his wife and child being aliens resident in Hungary, and Gabor was an unmarried man, who left a mother, also an alien, resident in Hungary.

These actions are brought by the administrator of the two deceased men for the benefit, in the one case of the widow and child, and in the other for the benefit of the mother.

The Provincial laws being, as they are, applicable to foreigners within the Province, the deceased, if only injured, would have been entitled to sue the defendants in respect of the injury, but they were killed; and it is contended that any cause of action arising under the circumstances in question died with them.

The amendment to Lord Campbell's Act, being sec. 2 of R.S.O., 1897, ch. 166, enacts as follows:

"Where the death of a person has been caused by such wrongful act, neglect or default as would (if death did not ensue) have entitled the party injured to maintain an action and recover damages in respect thereof, in such a case the person who would have been liable, if death did not ensue, shall be liable to an action for damages notwithstanding the death of the person injured," etc.

The defendants in this case, borrowing the argument advanced in *Adam v. British and Foreign Steamship Co.*, [1898] 2 Q.B. 430, contend that it is not the policy of Parliament to legislate for persons over whom it has no control, either in the way of imposing burdens or of conferring benefits upon them, and that in the absence of any expression of such intention the amendment to the Act does not give a cause of action under the circumstances present in these cases.

The same question came up in *Davidsson v. Hill*, [1901] 2 K.B. 606, which expressly overruled *Adam v. British and Foreign Steamship Co.*, supra. *Davidsson v. Hill* dealt with a cause of action arising under the laws of the United Kingdom, and the reasoning in that case would apply with still greater force to a cause of action arising under the laws of a Province of the Dominion of Canada.

If persons beyond the legislative control of the Province of Ontario are not entitled to the benefit of the amendment to Lord Campbell's Act, then British subjects resident in other Provinces, equally with aliens resident in a foreign country, would be beyond its scope. The amending Act draws no distinction between relatives who may be aliens resident abroad and relatives being British subjects resident in another Province, but, in general words, in effect declares that if the death of a person happens under circumstances which if he had been only injured, would have entitled him to maintain an action for damages, the person causing such death shall be liable in damages to the relatives of the deceased.

Could it be seriously contended that the Legislature intended that the amendment should not apply for the benefit of relatives of the deceased being British subjects resident in another Province? And yet that would be the necessary construction to place upon the Act if the defendants' contention were to prevail.

Following *Davidsson v. Hill* I consider the plaintiffs entitled to maintain these actions.

During the argument I expressed my surprise at the smallness of the verdicts, which I thought wholly inadequate, and counsel for the plaintiffs thereupon requested me to state my views upon the point when dealing with the motion. Inasmuch as any exception to be taken to the verdicts is a matter for consideration on appeal from these verdicts I do not feel at liberty to add anything to what I have above stated.

Let judgment be entered for the plaintiffs for the amount of the verdicts in question, with costs of action in each case on the High Court scale.

Mulock, C.J.

1906

GYORGY  
v.  
DAWSON.

G. F. H.

## [DIVISIONAL COURT.]

D. C.

1907

Jan. 14.

## CUMMINGS V. THE CORPORATION OF THE TOWN OF DUNDAS.

*Highway—Stream—Breaking through Dams—Bridge Over Stream Stopping Flow of Water—Destruction of Highway—Duty of Municipality to Repair, Reasonable Cost—Damages—Mandamus—Indictment—Injunction.*

Where the destruction of a highway is caused by the gradual encroachment of the sea or a lake, arising from natural causes, the water occupying the former location of the highway, and whereby there is a change of ownership in the land encroached upon, it becoming vested in the Crown, and available for purposes of navigation, there is no liability on the part of the municipality, by virtue of its duty to keep highways in repair, to replace the highway; but if the element of ownership does not arise, a duty to repair may exist where the destruction is of such a character, taking into consideration the cost of repair, that the restoration of the highway may not unreasonably be regarded as coming within the bounds of such duty.

In a creek, in the town of Dundas, a couple of dams built some sixty years ago had broken away, whereby large quantities of stones, sand and other debris were carried down and deposited in the channel adjacent to the plaintiff's land, the accumulation being added to by a bridge across the creek, built by a railway company, which choked the flow of the water, the effect being that a portion of the highway in front of the plaintiff's land, and which was the only mode of ingress and egress to and from it, was washed away, rendering it difficult for two vehicles to pass each other. By removing the check to the flow of the water, caused by the bridge, and by the expenditure of \$150, a roadway 30 feet wide could be furnished, while at a cost of \$800 a permanent and satisfactory roadway could be provided:—

*Held*, no question of ownership arising, and taking into consideration the cost of repair, that the destruction of the highway was not of such a character as would relieve the municipality from their obligation to repair; and that they were liable to the plaintiff for the special damage he had sustained by reason of their neglect.

A mandamus will not be granted in such a case.

If the relief sought was as one of the public the remedy would be by indictment.

An injunction was also refused, it not appearing that the municipality had interfered with the flow of the water.

The judgment of Street, J., 10 O.L.R. 300, reversed.

THIS was an appeal to a Divisional Court from the judgment of Street, J., at the trial, reported in 10 O.L.R. 300.

On February 2nd, 1906, the appeal was heard before MULLOCK, C.J. Ex.D., TEETZEL and ANGLIN, JJ.

*E. D. Armour*, K.C., for the appellants.

*J. W. Nesbitt*, K.C., and *H. C. Gwyn*, for the respondents.

The arguments and authorities sufficiently appear from the judgment.

The Court, subsequently asked for the report of an engineer as to the probable cost of constructing a permanent and substantial roadway of reasonable height and width above flood water. Mr. Armour, C.E., was selected by the parties for the purpose, and the delivery of the judgment stood over pending his report.

Mr. Armour duly made his report, and the case was spoken to in Court, when it was agreed by the counsel for both parties that the statements and opinions of Mr. Armour might be accepted by the Court.

The judgment of the Court was subsequently delivered on January 14, 1907, by MULLOCK, C.J.:—This is an action by Maurice Cummings against the corporation of the town of Dundas for damages, and also asking for a mandamus ordering the defendants to repair Quay and Church streets in Dundas, and for an injunction restraining them from obstructing the natural flow of a certain creek.

The claim for damages is made on the following grounds: that the streets in question have, by the defendants' negligence been allowed to fall into such disrepair, as to deprive the plaintiff of reasonable access to his property on Quay street; that the defendants erected a dam on a certain creek, and thereby caused the creek to be diverted from its natural channel; to encroach upon and wash away part of Quay street, and to overflow upon and injure the plaintiff's property.

The defendants deny that any damage to the plaintiff or his property was caused by negligence or breach of duty on their part; and also plead as a defence, the provisions of sub-sec. 1 of sec. 606, of the Consolidated Municipal Act, 1903, which requires an action for damages for non-repair of a highway to be brought within three months from the happening of the damage in question.

The case first came on for trial on the 13th of October, 1904, but stood over to enable the plaintiff to amend by adding the Attorney-General as a party plaintiff, and this having been done, it was tried on the 12th of June, 1905, by the late Mr. Justice Street, who, after reserving judgment, dismissed the action with costs, and from this decision the plaintiff appeals.

The facts appear to be as follows:

D.C.

1907

CUMMINGS

v.

TOWN OF  
DUNDAS.



D. C.  
1907  
CUMMINGS  
v.  
TOWN OF  
DUNDAS.  
Mulock, C.J.

The plaintiff's property is situate on low land in the town of Dundas, on the south side of Quay street, which is a public street under the control of the defendants, and is the only public way whereby ingress and egress to and from the plaintiff's property can be had. Originally a creek flowed past the plaintiff's property in a well-defined channel, distant some 75 yards northerly of Quay street. This channel became filled up with stones, gravel, sand and other debris, brought down by water, and the creek, thus diverted from its natural channel, formed three new channels, one of which led down to Quay street, and in the course of years the water, taking this channel, washed away a part of Quay street, and now occupies so much of the former location of the highway that its width at places in front of the plaintiff's property scarcely allows two vehicles to pass each other; and this is the condition of Quay street, for which the plaintiff seeks to hold the defendants liable. He also claims that the bridge on Church street became, and for an unreasonable time remained, impassable, whereby he suffered special damage.

As regards Quay street, the learned trial Judge held that the case was not one of non-repair, but of destruction of the road, to which the statute does not apply, and dismissed the action.

The plaintiff charges the defendants, as owners of one of the dams, with having by the erection of such dam interfered with the natural flow of the water, and caused the channel to be obstructed, whereby the water caused the injuries complained of; but there is no evidence to support this contention. It was not until after the 4th of September, 1897, that the defendants acquired the dam, whilst the obstructions to the channel had taken place prior to that date. They are not, therefore, liable for the injury done to the plaintiff's property, nor for the condition of Quay street, unless it be that of non-repair and not destruction.

The cause of the washing away is not, I think, difficult to determine. Two streams, rising in the high lands, in the vicinity of Dundas, unite and form the creek in question, which runs down to the low land past the plaintiff's property. Some 60 years ago two dams at least were erected on this creek, and the breakages in these dams allowed large quantities of stones, sand and other debris to be carried down and deposited in the channel of the creek opposite the plaintiff's property. In about the year 1875 a bridge

was erected by the Hamilton and Dundas Railway Company over this creek at the place where it crossed Church street, being a point below the plaintiff's property. This bridge checked the flow of the water, and thus contributed additional deposits of silt in the channel. Further, it is probable that this sluggishness of the creek led to further deposits in the channel by freshets, which, doubtless, frequently occurred. Thus in time the channel became completely filled up, and the water formed for itself the three channels, above mentioned, one of which washed away a part of Quay street: and the question is: whether such washing away of the highway amounts to destruction.

There are a number of cases wherein damage to the highway has been held to amount to destruction. In *Regina v. Bamber* (1843), 5 Q.B. 279, which is an indictment for non-repair of a highway, the defendant held certain lands used as a highway adjoining the sea. Gradually the sea encroached on the land, leaving but a narrow strip of highway at the edge of a precipitous bank some 70 feet in depth; and Lord Denman, C.J., says, at p. 287: "Both the road which the defendant is charged with liability to repair, and the land over which it passes, are washed away by the sea. To restore the road, as he is required to do, he must create a part of the earth anew. I do not rely much upon the argumen that the ancient line of highway has been removed. But here all the materials of which a road could be made have been swept away by the act of God. Under those circumstances can the defendant be liable for not repairing the road? We want authority for such a proposition and none has been found."

In *Regina v. Inhabitants of Hornsea* (1854), 1 Dears. C.C. 291, at p. 301, the sea had gradually encroached upon and swept away a part of the shore over which the road passed to the sea-coast, leaving a perpendicular cliff, and it was sought to hold the defendants liable for not rebuilding their road from the cliff down to and across the portion of shore thus washed away. The Court held that the portion of road thus washed away had ceased to exist. It had, in fact, become part of the sea, and thus there was no road in existence to repair. The obligation to repair depends upon there being something in existence capable of being repaired. When, therefore, the subject of repair ceases to exist the obligation to repair also ceases.

D. C.

1907

CUMMINGS

v.

TOWN OF  
DUNDAS.

Mulock, C.J.

D.C.  
1907  
CUMMINGS  
v.  
TOWN OF  
DUNDAS.  
Mulock, C.J.

In *Rex v. Inhabitants of Landulph* (1834), 1 Moo. & R. 393, which was an indictment for non-repair of a road, the road in question led across a small inlet of a tidal river near the mouth. The road was not passable at high tide, and was usually a soft sludge at ebb tide. The jury were directed that if they thought it proved that the want of repair arose from the nature of the spot over which the road passed and was occasioned by the river flowing over it at every tide and washing away the materials placed there to form the road and leaving in their place a deposit of mud, the parish was not obliged to do repairs, which, from the nature of things, must always be ineffectual.

*Regina v. Inhabitants of the Parish of Paul* (1840), 2 Moo. & R. 307, was the case of destruction by the sea of a sea-wall upon which a road was built; and it was held that, there remaining nothing capable of being repaired, the defendants were not liable for non-repair.

In *McCormick v. Township of Pelee* (1890), 20 O.R. 288, the road ran along the shore of Lake Erie, and was gradually washed away, and its former site became covered by the waters of the lake. Boyd, C., said at p. 290: "The necessities of the case, then (to give the relief asked) would be to require the municipality not merely to repair but to restore. . . Any ordinary reparation at the point in question would be evidently ineffectual, even if the way were re-instated; no road can with reasonable outlay be maintained along the lake shore at this place without the erection of walls or embankments, or other expedients for resisting the encroachment of the lake."

In *Regina v. Inhabitants of Greenhow* (1876), 1 Q.B.D. 703, the defendants were indicted for the non-repair of a highway which ran along the slope of a hill several hundred feet above the level of a valley beneath. Two land slides comprising many acres of land occurred on the slope of the hill, and part of the highway was carried into the valley beneath and its place filled up with earth, stones and other debris. At one point the debris was twenty-five feet above, at another two feet below, the level of the old road, and occupied the line of the highway. At the point where the debris was 25 feet above the level of the old road it was ascertained by boring that for a depth of 31½ feet from the surface there was

nothing but the material brought down by the land slide, there being no trace of the old metalled road, though the line was known.

The landslips were of great magnitude, and in an indictment for non-repair a verdict of guilty was found subject to the opinion of the Court upon a consent case, part of which is as follows:—

“The part of the highway now in dispute and out of repair was absolutely destroyed by the landslip, that is to say, was carried away into the valley below, and its place supplied and filled up with earth, stones, and other débris of landslip. A large portion of the hillside was moved bodily downwards to the valley beneath, and the ground on which the old road stood was broken up and carried away as stated. . . . The débris is at one point twenty-five feet above, and at another two feet below, the level of the old road, and now occupies the line or track of the old highway. This débris consists of loose soil, stones, and shale, and there is water, coming from springs on the hillside, which percolates through and over it, and from the time of the original landslips up to the present time, in dry weather, both horses and some carts and conveyances still continue to pass over it, nearly in, but higher up the hill than the line of the old road, and of course with great danger and difficulty. In wet weather the débris is at times so full of water as to be impassable, as there are no drains. . . . The metal, consisting of broken stones, of the old road, has been carried away, at one point fifty-five yards down the hill, into the valley from its original position. . . . At the north edge of the landslip, at the point where the same meets the uninjured portion of the highway, the site of the old road is scooped out and lowered, so that there is a fall of some few feet from the uninjured metalling to the débris on the line or track of the old road.”

Three questions were submitted to the engineer for the information of the Court.

(1) What had become of the old road, and whether and to what extent had it been carried away from its former position? (2) Whether and to what extent it had been absolutely destroyed? (3) Whether it was practicable, and at what cost, to make a permanent and passable road along the whole track of a similar character to the adjoining parts of the old road?”

The engineer answered these questions as follows:—

D. C.

1907

CUMMINGS

v.

TOWN OF  
DUNDAS.

Mulock, C.J.



D. C.  
1907  
CUMMINGS  
v.  
TOWN OF  
DUNDAS.  
Mulock, C.J.

“(1) The old road had been carried away and overlaid by a landslip, at a point called Broughton Bank Top, to an extent of 252 yards or thereabouts. (2) The road is absolutely destroyed for the extent to which it is carried away and overlaid, amounting in the whole to the said length of 252 yards. (3) It is practicable to form a permanent and passable road along the old track of a similar character to the adjoining parts of the old road, and the cost of doing so would be £341.”

The case further stated that “the rateable value of the whole parish is £4756, and a rate of 5d. in the pound on this amount produces £100 or thereabouts;” and the question for the information of the Court was whether, under the circumstances, there was a legal obligation upon the defendants to make and maintain an available road in the line of the old road.

In giving judgment Blackburn, J., says, at p. 707:—“In this case I have great difficulty in giving a precise definition of what constitutes a destruction of a highway, but upon the facts found by the arbitrator I have come to the conclusion that enough has not been done or happened to the road in question to relieve the parish from the liability to repair it. Whether a highway has been destroyed or not, is a question of more or less, and it is a matter of common sense that where the road has been swept away and occupied by the sea, you cannot call upon the parish to repair it, or in the case of a sea-wall, where the public have acquired a right to walk on top of the wall, the parish could not be obliged to rebuild the wall if it were washed away by the sea. On the other hand, it would be equally impossible to say that, when, in consequence of a landslip or one of those floods which frequently occur in certain districts, the surface of a metalled road is filled up or covered over, the parish is relieved from liability.” And after referring to the facts he says: “Now, can we draw the inference that the old road has been wholly destroyed? I think, upon the facts which I have stated, I could hardly do so; but then we have the report of the surveyor that it is practicable to form a permanent and passable road along the old track of a similar character to the adjoining parts of the old road, and that the cost of doing so would be £341. I think that, in drawing such an inference, it would always be a question of more or less, and, for my part, the operations which are described as necessary do not seem to me to

involve any enormous difficulty. Therefore, in drawing my inference of fact, I think that it cannot be said that the road was annihilated, and that it was impossible, in a commercial sense, to repair it, that is, that it would cost more than the subject matter of repair is reasonably worth."

Quain, J., in giving judgment, said: "I am of the same opinion. It is very difficult, as has already been said, to lay down a rule as to when a road must be regarded as completely destroyed. In the cases which have been referred to, the highway was not injured in the manner described in this case, but the sea occupied the site of the road itself. Now, can we say that there was here such a complete destruction of the whole road as to bring the case within these authorities." After referring to the facts he says: "I cannot think that it is possible for us to say that the road has been absolutely destroyed, so as to exempt the parish from liability to repair."

In those of the above cited cases where the destruction was caused by the sea or lake (the action being gradual and arising from natural causes, and the water coming to occupy the former location of the highway), a change of ownership took place, whereby the land thus encroached upon became the property of the Crown available for purposes of navigation, but no longer being a road allowance: *Foster v. Wright* (1878), 4 C.P.D. 438; *In re Hull and Selby R. W. Co.* (1839), 5 M. & W. 327, 333.

Such physical injury to a highway as deprives its former owner of any title to it and of the right to repair it, whether the injury be called destruction or not, must necessarily relieve such owner of the obligation to repair; but when, as in the case of *Regina v. Inhabitants of Greenhow*, supra, the question is free from the element of change of ownership, then it becomes a question of fact whether the injury does or does not amount to destruction.

The injury to the highway in the present case is, I think, clearly distinguishable from cases of destruction by the action of the sea. Here the first causes of injury were the construction and breaking away of the dam and the check to the outflow caused by the erection of the bridge, whereby the natural channel became partly filled, when contributions of silt brought down by freshets completed the filling up. Thus the creek, largely by artificial means, was compelled to seek an entirely new channel, and in such case the owner of the soil of the new channel does not lose his ownership,

D C.

1907

CUMMINGS

v.

TOWN OF  
DUNDAS.

Mulock, C.J.

D. C.

1907

CUMMINGS

v.

TOWN OF  
DUNDAS.

Mulock, C.J.

otherwise riparian owners by diverting a river into a new channel might, without his consent, deprive a person of his property.

Further, it may be observed that when a river, from natural causes, takes a new channel, the owner of the soil in the new channel retains his ownership: *Mayor of Carlisle v. Graham* (1869), L.R. 4 Ex. 361, 373.

As stated in Coulson & Forbes Law of Waters, 2nd ed., p. 69: "Where, by the irruption of the waters of a tidal river an entirely new channel is formed in the land of a subject, the rights to the soil of the new channel remain as before in the subject."

This proposition made in reference to a tidal river seems to be too narrowly stated, for I find no authority supporting such a limitation. On the contrary, Lindley, J., in *Foster v. Wright*, supra, dealing generally with the law respecting changes in the bed of a river brought about by the action of the water, says, at p. 448: "Upon such a question as this I am wholly unable to see any difference between tidal or non-tidal or navigable or non-navigable rivers;" and Lord Hale, in *De Jure Maris*, p. 6, says: "There is no difference in this respect between the sea and its arms and other waters."

The reason for the law that lands which become gradually and imperceptibly submerged by the encroaching waters of a river is stated by Lindley, J., in *Foster v. Wright*, supra, at p. 446, as "based upon the impossibility of identifying from day to day small additions to or subtractions from land caused by the constant action of running water. The history of the law shews this to be the case."

This reason cannot apply where the river takes an entirely new channel, the old channel being clearly capable of identification.

In Hale's *De Jure Maris*, at p. 371 in Moore's History of the Foreshore, Lord Hale says: "If a fresh river between the lands of two lords or owners do insensibly gain on one or the other side; it is held, 22 Ass. 93, that the propriety continues as before in the river. But if done sensibly and suddenly then the ownership of the soil remains according to the former bounds. As if the river running between the lands of A and B leaves its course and sensibly makes its channel, in the lands of A, the whole river belongs to A . . . And though the book make a question, whether it holds the same law in the case of the sea or the river of it, yet certainly the law will be all one."

Thus, applying this rule to the case in question, it would seem that notwithstanding the encroachments of the water on Quay street, the ownership of the portion thereof occupied by water still remained in the defendant corporation, and the present is clearly distinguishable from those cases above referred to where the encroachments by the sea were such as to deprive the former owner of his title to the land encroached upon.

After this appeal was argued, the Court asked for the report of an engineer shewing the probable cost of constructing a substantial and permanent roadway of reasonable width and height above flood water, and Mr. Armour, C.E., having been selected for that purpose by both parties, made his report; and upon the case being again spoken to in court, counsel on both sides agreed that the Court might accept Mr. Armour's statements and opinions.

In his report Mr. Armour gives it as his opinion that if the check to the flow of the creek caused by the Hamilton and Dundas Railway Company were removed, a roadway 30 feet wide could be provided at a cost of \$150, otherwise it would cost about \$800 to provide "a permanent and satisfactory width."

The case being a question of fact whether there has been such destruction that restoration cannot be regarded as work of repair, the cost of restoration is an important circumstance in the determination of that question.

It is impossible to define the extent of damage necessary in order to take the case out of one of non-repair. In each case it must be one of degree; and it seems to me that if the damage can be effectually repaired at a cost reasonably within the means of the municipality, and that the expenditure seems justified by the public benefit to accrue from it, the case may properly be regarded as one of non-repair, and that the municipality is not relieved from liability.

Consideration of the mere physical damage to a road cannot alone determine whether it amounts to destruction.

Numerous instances occur throughout the Province of waters bursting their boundaries, crossing improved highways, washing away not only all traces of improvement, but also large quantities of the material forming the natural bed of the highway and leaving impassable gullies. Physically regarded, the destruction of the

D.C.

1907

CUMMINGS

v.

TOWN OF  
DUNDAS.

Mulock, C.J.



D. C.

1907

CUMMINGS

v.

TOWN OF  
DUNDAS.

Mulock, C.J.

highway has been complete, but it could hardly be contended, I think, that in such case the Legislature intended that sec. 606 should receive the narrow construction that the public were not entitled to look to the municipality to repair such damaged highway.

If this were the scope of the section, then communities, seriously inconvenienced by such breaks in travelled roads, would often be unable to carry on many of their ordinary affairs of life. The Legislature, which has at all times endeavoured to supply the public with effective municipal machinery, did not, I think, intend that in respect of injury to a highway the municipality should be exempt from liability to repair, if it could be effectually repaired at a reasonable cost and one bearing a reasonable proportion to the benefit to accrue.

As stated by Harrison, C.J., in *Caster v. Township of Uxbridge* (1876), 39 U.C.R. 113, "the enactment ought to receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act. The object of the Act is the safety and convenience of the public when lawfully using the highways of the municipality. We should, therefore, if possible, give to the Act such fair, large and liberal construction as will best ensure the attainment of that object." And further on he says: "The question whether a highway is in repair or not at the time of the occurrence of an accident, is in general a question of fact."

Meredith, J., in *Plant v. Township of Normanby* (1905), 10 O.L.R. 16, says: "Their duty" (*i.e.*, of the corporation) "is prescribed in the words: 'Every public road, street, bridge and highway shall be kept in repair by the corporation.' That does not mean that they shall restore some existing thing to the state in which it was before falling into disrepair, but it does mean that they shall keep such highways in such a condition of reparation as the reasonable demands of the traffic over them shall from time to time require, having regard to the corporation's means of performing such duty—and efficient state of repair having regard to all the surrounding material circumstances."

In the present case the damage to Quay street may be permanently and sufficiently repaired at an outlay of \$800. This does not appear an unreasonable burden to cast upon the ratepayers of the

important town of Dundas. The expenditure will supply a safe and convenient highway for the general public, and be of special advantage to the plaintiff in respect of his property on Quay street, now rendered almost valueless by the condition of non-repair of the highway. It may also be possible for the defendants to accomplish the same end for \$150.

I therefore think that in considering the question of fact, whether the condition of the highway is that of non-repair or amounts to such complete destruction of the highway as would relieve the defendants of liability to restore, the proper inference to draw is, that it is a state of non-repair and that the defendants are liable to the plaintiff Cummings in respect of the special damage sustained by him as owner of the property in question; and therefore, with great respect, I am not able to agree with the view of the learned trial Judge, that it is a case of destruction for which the defendants would not be liable.

The plaintiff is entitled to damages only for a period commencing three months before the issue of the writ, and I award him \$25 damages up to the commencement of this action. If he desires a reference as to damages since that date, or if he is dissatisfied with the amount now awarded, he can have a reference to ascertain the amount, the costs of such reference to abide the result of such reference and to be determined by the Master. He also claims damages by reason of the Church street bridge being out of repair. The evidence does not shew that he suffered any special damage. Further, the bridge was repaired within a reasonable time. That claim therefore should be dismissed.

The plaintiff asks that the defendants be ordered by mandamus to repair. He is not, I think, entitled to such relief. A person suffering special damage because of non-repair of a highway has his remedy in damages. If he suffers only as one of the general public, then he has his remedy by indictment. Thus he has a specific remedy, and in such case the Court will not grant the extraordinary remedy of mandamus: *Rex v. Bank of England* (1782), 2 Doug. 526. Further, a mandatory order from its very nature, requiring the performance of a specific duty is inapplicable in the case of a general duty to repair: *Hyslop v. Township of McGillivray* (1886), 12 O.R. 749; (1888) 15 A.R. 687; *Hubert v.*

D.C.

1907

CUMMINGS

v.

TOWN OF  
DUNDAS.

Mulock, C.J.

D.C.

1907

CUMMINGS

v.

TOWN OF  
DUNDAS.

Mulock, C.J.

*Township of Yarmouth* (1889), 18 O.R. 458; *Attorney-General v. Staffordshire County Council*, [1905] 1 Ch. 336.

The plaintiff also asks for an injunction restraining the defendants from interfering with the course of the water. The evidence fails to shew such interference, and he is therefore not entitled to an injunction.

He should be paid his costs of action on the High Court scale, and the costs of this appeal.

TEETZEL and ANGLIN, JJ., concurred.

G. F. H.

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[BRITTON, J.]

1906

BYERS v. KIDD.

Dec. 5

*Costs—Defamation—Verdict for Defendant—Depriving Defendant of Costs—Discretion—Good Cause—Con. Rule 1130—English Order 65, Rule 1.*

In the exercise of his discretion in depriving a successful defendant of his costs, the trial Judge is not obliged to find, under Con. Rule 1130, what would necessarily be "good cause" under the English Order 65, Rule 1; at the same time he must not exercise his discretion arbitrarily, but for a reason which reasonably satisfies him that it should be so exercised.

In an action of slander a successful defendant was disallowed his costs, where the trial Judge was satisfied that the defendant by his conduct had provoked the litigation, and had really made use of the words attributed to him, notwithstanding the finding of the jury to the contrary, and had refused to carry out a proposed settlement which he had at first acceded to, and the jury had intimated that the costs should be equally divided between the parties.

THIS was an action for slander tried before BRITTON, J., and a jury, at Peterborough, on October 8th 1906, when the jury found for the defendant, who thereupon moved for the costs of the action.

*R. F. McWilliams*, for the plaintiff.

*D. O'Connell*, for the defendant.

The learned Judge reserved his decision, and subsequently delivered the following judgment, in which the facts, so far as material, are stated:

December 5. BRITTON, J.:—Under circumstances mentioned below the jury found for the defendant. The defendant asked for costs and the question was reserved.

I am of opinion that the defendant should not get costs.

In exercising a discretion to deprive the defendant of costs I am acting under Rule 1130, and therefore not called upon to find what would necessarily be "good cause" within the meaning of decisions under the English Order 65, Rule 1.

To find "good cause" within that order, it was held in *Jones v. Curling* (1884), 13 Q.B.D. 262, that there must be facts shewing that it would be more just not to allow the costs to follow the event. I think there are facts here, although not such as in *Jones v. Curling*, establishing good cause.

Apart from that, it must be conceded at once that the discretion should not be arbitrarily exercised, "should not be exercised by chance medley, nor by caprice, nor in temper": *Huxley v. West London Extension R.W. Co.* (1886), 17 Q.B.D. 373.

There must be some reason, reasonably satisfactory to the Judge, for depriving a person who has the verdict of the jury of the benefit or indemnity that usually results from such verdict.

I find in this case what satisfies me that the discretion as to costs should be exercised against the defendant.

The defendant's conduct provoked litigation when the dispute would probably have ended with the termination of proceedings before a Justice of the Peace. The defendant after the first altercation assaulted the plaintiff. He admitted the assault and was fined for it. Up to this point he had apparently been accusing the plaintiff only upon the authority of what had been said by a person named Campbell. After the defendant had heard the plaintiff's denial of cutting coal bags of the defendant, and after the defendant knew that Campbell had taken back what he said, and called it "a joke" the defendant said to the plaintiff: "Campbell told me you cut the coal bags, and if it comes to that I can prove that you cut the coal bags."

It is true that the jury found for the defendant, and it may be argued that they found that defendant did not use this language. I think the defendant did use this language, and it is not necessarily going behind the verdict for me for the purpose of determining the

Britton, J.

1906

BYERS

v.

KIDD



Britton, J.

1906

BYERS

v.

KIDD

question of costs to so find. That language had a good deal to do with bringing this action to trial.

Again, it appeared before me that there were negotiations for settlement, and the defendant agreed to pay part of the plaintiff's costs. The plaintiff agreed to accept such settlement, and the defendant refused to carry it out.

Again, the jury came in, and instead of rendering a verdict, said "no bill," each party to pay half the costs, and they were told to find for the plaintiff or the defendant upon the issue. After considerable time in deliberating they again came in and said: "Verdict for the defendant, the costs of the court to be equally divided by the plaintiff and the defendant."

The jury, upon being sent back by the learned county Judge, who for the purpose of taking the verdict acted for me, returned later with the verdict for the defendant.

The decision of the jury, if the discretion had been with them instead of the Judge, would have been as now rendered by me.

For these and other reasons I think the judgment should be for the defendant, without costs.

G. F. H.

## [DIVISIONAL COURT.]

RE PORTER.

D. C.

1906

Nov. 13.

1907

Jan. 25

*Will—Restraint on Alienation—Devise in Fee—Restriction Against Devisee Mortgaging or Selling During His Lifetime.*

A testator by his will devised certain land to his "son H.P., his heirs and assigns, to have and to hold to said H.P., his heirs and assigns, for his and their sole and only use forever, subject to the condition that the said H.P. shall not during his lifetime either mortgage or sell (the land) thus devised to him:—

*Held*, that the restraint on alienation, being limited, was good.  
Judgment of Britton, J., affirmed.

This was an appeal from the judgment on a motion by the beneficiary and adult remaindermen under the will of one Hugh Porter for an order declaring the construction of the will.

The motion was made in Weekly Court, on the 12th day of November, 1906, before BRITTON, J., in whose judgment the clause of the will sought to be continued is set out.

*J. H. Spence*, for the applicants.

*F. W. Harcourt*, Official Guardian, for the infants.

November 13. BRITTON, J.:—Hugh Porter made his will on 3rd February, 1887, and died on 12th August in the same year.

The clause of the will, of which construction is asked, is as follows:—"I give, devise, and bequeath lot number 13 in the 10th concession of the township of Grey, in the county of Huron, to my son Hugh Porter, his heirs and assigns, to have and to hold the same unto the said Hugh Porter, his heirs and assigns, to and for his and their sole and only use forever, subject to the condition that the said Hugh Porter shall not during his lifetime either mortgage or sell the said lot thus devised to him."

Hugh Porter now asks that the condition against his mortgaging or selling be declared invalid.

In *Heddlestone v. Heddlestone* 15 O.R. 280, MacMahon, J., decided, 10th February, 1888, that in the case of lands devised to three sons, subject to the condition that these lands should not be disposed of by them, "either by sale, by mortgage, or other-

D. C.  
1906  
RE  
PORTER  
Britton, J.

wise, except by will to their lawful heirs," the condition was invalid, and that the devisees were entitled to hold the land freed from the restriction.

The difference between the *Heddlestone* case and the present is that there was in that case the additional restraint upon the devisee against disposing of the land by will except to his lawful heirs. That case was considered, as, indeed, were all the recent cases upon the point, by my brother MAGEE, in *Re Martin and Dagneau* (1906), 11 O.L.R. 349. In that case the words under consideration were: "None of my sons will have the privilege of mortgaging or selling their lot or farm aforesaid described," and the learned Judge held that this restraint on alienation was valid.

I am unable to distinguish between the present case and the one last cited, and so must follow it. In view of the many cases in which the line of distinction and difference is fine, I would not be sorry to have them now considered afresh by an appellate Court.

Restriction valid.

No costs.

From this judgment the applicant appealed to a Divisional Court, and the appeal was argued on the 18th of January, 1907, before MULOCK, C.J.Ex.D., TEETZEL and ANGLIN, JJ.

*J. H. Spence*, for the appeal. The Judge of first instance followed *Re Martin and Dagneau*, 11 O.L.R. 349, and held that the restraint on alienation was valid, but suggested an appeal. The condition is that the devisee "shall not during his lifetime either mortgage or sell." Strike out the words "during his lifetime," which really have no meaning, as the devisee could only sell or mortgage during his lifetime, and the restraint is absolute and, as a result, invalid. There are two lines of cases on the point, but we should follow our own Supreme Court: *Blackburn v. McCallum* (1903), 33 S.C.R. 65, *per* Davies, J., at p. 80, which follows *In re Rosher*, *Rosher v. Rosher* (1884), 26 Ch. D. 801, which was the first case holding the restraint invalid; but *In re Macleay* (1875), L.R. 20 Eq. 186, had held it valid, and did not follow *Attwater v. Attwater* (1853), 18 Beav. 330; *Heddlestone v. Heddlestone*, 15 O.R. 280. *Re Winstanley* (1884), 6 O.R. 315, holding the restraint valid, was

decided prior to *In re Rosher*, *Rosher v. Rosher*. I also refer to *Re Shanacy and Quinlan* (1897), 28 O.R. 372; *Renaud v. Tourangeau* (1867), L.R. 2 P.C. 4; *Re Thomas and Shannon* (1898), 30 O.R. 49; *Re Machu* (1882), 21 Ch.D. 838.

*F. W. Harcourt*, Official Guardian for the infants. The restraint is perfectly good in this case, and in all similar cases is always valid, unless it interferes with the law against perpetuities. *Re Martin and Dagneau*, 11 O.L.R. 349, covers the whole ground, and was rightly followed by the Judge below.

January 25. The judgment of the Court was delivered by TEETZEL, J.:—The question for determination is whether the restraint contained in the following clause of the will of the late Hugh Porter is valid, viz.:—

“I give, devise and bequeath lot number 13 in the 10th concession of the township of Grey, in the county of Huron, to my son Hugh Porter, his heirs and assigns, to have and to hold the same unto the said Hugh Porter, his heirs and assigns, for his and their sole and only use forever, subject to the condition that the said Hugh Porter shall not during his lifetime either mortgage or sell the said lot thus devised to him.”

The appeal is from the judgment of Mr. Justice Britton, holding that it was valid, following the recent case of *Re Martin and Dagneau*, 11 O.L.R. 349.

In that case Mr. Justice Magee very fully discussed the English and Canadian authorities bearing on the question of restraints imposed by testators upon the alienation of lands devised in fee simple, and as I fully agree with his conclusion and in its application to this case, a further review of the authorities is quite unnecessary for the purpose of this judgment.

The distinction in many of the cases is very finely drawn, and it is difficult, if not impossible, to reconcile them or to reduce them to any common principle. Suffice it to say, that since the judgment of Sir George Jessel in *In re Macleay*, L.R. 20 Eq. 186, the Courts of this Province, beginning with *Earls v. MacAlpine* (1881), 6 A.R. 145, have consistently adopted the view that you may restrict alienation by prohibiting a particular class of alienation. The cases are all cited in *Re Martin and Dagneau*, supra.

D. C.  
1907  
RE  
PORTER



D. C.  
1907  
RE  
PORTER.  
Teetzel, J.

The judgment in *In re Macleay* was much criticised by Pearson, J., in *In re Rosher*, *Rosher v. Rosher*, 26 Ch. D. 801, in which it was held that a condition in absolute restraint of alienation annexed to a devise in fee simple, even though its operation is limited to a particular time, *e.g.*, the life of another living person, is void in law as being repugnant to the nature of an estate in fee simple. That case was decided upon the hypothesis that the restraint was absolute and not limited; consequently, it was not necessary for the decision of the case to determine the question of the validity of a partial restraint.

An interesting comment on this judgment will be found in 28 Solicitor's Journal, 559.

In *Blackburn v. McCallum*, 33 S.C.R. 65, which was a case involving the question, whether an absolute restraint on alienation for a fixed period was valid, it was decided that such general restraint, even for the limited time, was void; in this respect following *In re Rosher*, *supra*; but in discussing *In re Macleay*, *supra*, *Doed. Gill v. Pearson* (1805), 6 East, 173, and *In re Rosher*, *supra*, Davies, J., at p. 80, says: "In allowing this appeal we are, it is true, following the decision of *Re Rosher*, but we are not over-ruling either of the other cases above referred to in which restraints upon alienation were allowed." And further, at p. 81, he says: "While they" (referring to *In re Macleay* and other cases *supra*) "support the contention that a restriction upon alienation limited to a specified class only may be good, (they) do not support the proposition we are asked to endorse, that a general restriction upon alienation which, if unrestricted as to time, would be admittedly bad, is made good by a time limitation. It seems to me that a time limitation is necessary in any case where restrictions upon alienation are attempted to be imposed upon a fee simple devise, even with respect to a class of persons; otherwise the devise might be bad as contravening the rule against perpetuities."

This is the first expression of opinion that I have found requiring a time limitation to be imposed in order to make valid a partial restriction, either as to the class of alienation or as to the individuals prohibited.

It is not necessary in this case to consider how far this expression of opinion was necessary for the decision of the point then before

the Court, because, there is in the will in question here a specific limitation, both as to the character of alienation and as to the time within which such alienation shall not be made. The will forbids alienation by "mortgage or sale" only during the lifetime of the devisee, and does not restrain alienation by will, lease or other manner, except by "mortgage or sale," and the judgment appealed from is, therefore, not only fully supported by the decisions in the Ontario Courts, but is within the above opinion of Mr. Justice Davies on the subject.

The appeal must be dismissed with costs.

G. A. B.

D. C.

1907

RE  
PORTER

Teetzel, J.

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[IN CHAMBERS.]

1907

BURNS V. TORONTO RAILWAY COMPANY.

Feb. 12.

*Discovery—Medical Examination before Statement of Defence—  
Con. Rules 442 and 462.*

An examination under Con. Rule 462 is an examination for discovery, and that rule must be applied in the same way as Con. Rule 442; and an order for the medical examination of the plaintiff, in an action where the liability is disputed, will not be made if opposed, before the delivery of the statement of defence.

THIS was a motion by the defendants for an order for the medical examination of the plaintiff before the delivery of the statement of defence; and to have the time for delivery of the defence extended for a week after the making of the report.

The motion was argued on the 11th of February, 1907, before MR. CARTWRIGHT, Master in Chambers.

*Frank McCarthy*, for the motion.

*H. C. Macdonald*, contra.

February 12. THE MASTER IN CHAMBERS:—Con. Rule 462 is found under the head of discovery, and must be applied in the same way as Con. Rule 442. In *Fraser v. London Street R.W. Co.* (1899), 18 P.R. 370, Osler, J.A., said (at p. 372) of the application of this Rule 462, "It is an examination for discovery only."

It was urged in support of the motion that its object was to enable defendants to pay into Court such amount as they might think sufficient compensation. This they wish to do without admitting liability. This they can do just as well when the cause is at issue, as was done, e.g., in *Stephens v. same Defendants* (1906), 7 O.W.R. 39. The extra costs will only be comparatively trifling.

While the motion might perhaps have a different result if liability was admitted, there does not seem to be power to make the order asked for here, when opposed. In the case in which such an order was made on 27th June last, at the close of the argument (not reported), I think the order must have been practically by consent. If the plaintiff consents an order may issue after defence is delivered to save any further motions. In that case costs of this motion will be to the plaintiff in any event.

G. A. B.

## [DIVISIONAL COURT.]

## CANADIAN OIL FIELDS CO. V. VILLAGE OF OIL SPRINGS.

D. C.

1906

*Assessment and Taxes—Mining Lands—Value as Agricultural Lands—Buildings—Plant—Wrongful Assessment—Illegality—Jurisdiction of the Court—Provisions of Assessment Act.*

Oct. 29.

1907

Jan. 17.

Mining lands were assessed at their value as agricultural lands under sub-sec. 3 of sec. 36 of the Assessment Act of 1904. The assessor also assessed the buildings and mining plant as such, and adding the two latter together entered them on the roll as the assessed value of the buildings:—

*Held*, that that method was an attempt to evade the fair meaning of the Act, and that the assessment of the exempted property, the plant, was illegal. It was not for the assessor in the exercise of his judgment to assess the exempted property for taxation at any amount; and the illegality being established the court had jurisdiction to deal with the matter outside of the machinery provided by the Assessment Act for dealing with such a complaint.

Judgment of Boyd, C., reversed,

THIS was an appeal from a judgment at the trial, in an action for a declaration that an assessment made by the defendants upon the plaintiffs was illegal, and for an injunction to restrain the defendants from enforcing it.

The action was tried at Sarnia, on the 17th day of October, 1906, before BOYD, C., without a jury.

*A. Weir and I. Greenizen*, for plaintiffs.

*R. I. Towers*, for defendants.

October 29. BOYD, C.:—Sub-section 3 of sec. 36 of the Assessment Act of 1904, 4 Edw. VII., ch. 23 (O.), is not a novel provision. It has been in force since 1869, 33 Vict. ch. 27, sec. 5 (O.), and was then introduced in order to encourage investors in mining and mineral propositions by keeping down the assessable value to that of farming lands. The evidence in this case is that if the actual value of the lands in question as mineral lands was to be the basis of taxation, the burden would be much more onerous than it now stands.

The contention here is briefly this, that it was not in the power of the assessing body of the municipality to assess both land and buildings in the case of mineral lands. The only power, it is argued,



D. C.  
1906  
CANADIAN  
OIL FIELDS  
Co.  
v.  
VILLAGE  
OF OIL  
SPRINGS.  
Boyd, C.

was to fix the value of the lands (apart from all structures thereon) on an agricultural basis, and then further to tax on the footing of the income produced. But it is shewn and conceded on all hands that there is no income as to this property, so that the point is reduced to whether "buildings" could be assessed separately as well as the land.

Regard now the scheme of the Act. By the interpretation clause the word "land" shall include (b) trees, etc.; (c) minerals, gas, oil, etc.; (d) all buildings, structures, machinery, and fixtures erected or placed upon, in, over, under or affixed to land: sec. 2, sub-sec. 7.

By sec. 5 all real property (which includes buildings and structures thereon) shall be liable to taxation subject to certain exemptions of which by sec. 5, sub-sec. 16, "all fixed machinery used for manufacturing or farming purposes" is exempt from taxation, but this exemption, as appears from the very frame of the whole sub-clause, does not cover natural gas and oil appliances constructed upon this property. It was not suggested that this machinery and plant were used for manufacturing purposes. By sec. 22 the assessor is to ascertain and set down in the roll particulars as to the value of the land exclusive of the buildings (13) and further (14) as to the value of the buildings.

Then as to valuation of lands, real property shall be assessed at its actual value except in the case of mineral lands: sec. 36 (1). In case of land with buildings the value of each separately is to be ascertained and set down in different columns. And the test for the value of the buildings is the amount by which the value of the land is thereby increased: sec. 36 (2). As to mineral lands, their value and [that] of the buildings thereon shall be valued and estimated at the value of other lands in the neighbourhood for agricultural purposes: sub-sec. 3. I do not read this to mean that the value of the mineral lands and buildings is to be estimated as if there were no buildings thereon, or to put it another way, that the value of mineral lands and all structures thereon are to be valued as if they were agricultural lands without buildings. Agricultural buildings are to be valued and assessed if the land is improved thereby,—so are structures on mineral lands to be assessed and valued. The scheme of the Act is to put mineral lands and buildings on the footing of farming lands and buildings,—

but not to give to mineral lands any further benefit, such as to exempt all structures and appliances thereon in the nature of buildings from being taxable in any wise. Probably the trouble and apparent difficulty has arisen from too literally regarding the section when it speaks of "the lands in the neighbourhood for agricultural purposes" as if it meant to exclude the buildings. But the term "land", as used in the statutes, *per se* includes buildings: only they are to be kept separate in making up the values. And it is only in this new Act that buildings are to be kept separate from lands in the analysis of assessment: sec. 22 (13, 14). In the earlier Acts was no such distinction. One need not fall back on cases to find out what is meant by "buildings". The interpretation clause suffices, and under its terms all the derricks, tanks, pipes, jerkers, triangles, and other odd-sounding contrivances, may readily be grouped.

I see no ground to interfere with the conclusion of His Honour the county Judge, on this head.

The assessor gave evidence that he valued all the buildings or improvements on the property at a rate of \$75 for each well, which he says "was greatly in excess of their real value, and that on any footing, whether of agricultural or other purpose, or even as old iron, they would be worth \$75." I am not concerned with values, with the little or much, or the less or more; it is enough if the buildings are assessable. In that case jurisdiction to assess attached, and the judgment of the county Judge on the amount is conclusive: Act of 1904, sec. 75.

It is admitted, however, that there is a clerical error in his figures by which "three" is extended as "five," and that the valuation as to certain warehouse buildings from which the court of revision deducted \$2,000 was intended to be affirmed by the Judge. The amount of assessment should be reduced by this \$2,000, but in other respects the action fails. As to so much of the action as relates to this clerical error, no costs—as to the rest of the litigation, costs to defendants.

From this judgment the plaintiffs appealed to a Divisional Court, and the appeal was argued on the 16th of January, 1907, before MULOCK, C.J. Ex.D., TEETZEL and ANGLIN, JJ.

D. C.

1906

CANADIAN  
OIL FIELDS  
Co.v.  
VILLAGE  
OF OIL  
SPRINGS.

Boyd, C.

D. C.  
1907  
CANADIAN  
OIL FIELDS  
Co.  
v.  
VILLAGE  
OF OIL  
SPRINGS.

*A. Weir*, for the appeal. The assessment here is not authorized by the Assessment Act. The lands assessed are mining lands. The plant assessed consisted of derricks, tanks, pipes, jerkers, triangles, pumps, poles, tripods, etc., which are mere attachments to the lands, and are not buildings, even if buildings should be assessed. All the assessor had power to do was to assess the land at the value of other lands in the neighbourhood for agricultural purposes: 4 Edw. VII. ch. 23, sec. 36, sub-sec. 3 (O.). He had nothing to do with the value as mineral lands or any improvements. It was never intended to assess both capital and income. Here there was no income, but that is immaterial. *Toronto Railway Company v. Corporation of the City of Toronto*, [1904] A.C. 809, is a typical case in point. I also refer to *Moir v. Williams*, [1892] 1 Q.B. 264, at p. 270; *Bowes v. Law* (1870) L.R. 9 Eq. 636, at p. 641; *Foster v. Fraser*, [1893] 3 Ch. 158; *The Vicar and Churchwardens of St. Botolph, Aldersgate Without v. The Parishioners of the same*, [1900] P. 69; *Wendon v. London County Council*, [1894] 1 Q.B. 812; *Weir on Law of Assessment*, pp. 10 and 40.

*R. I. Towers*, contra. On the proper construction of the section, the plant and buildings situate on mineral lands are assessable. The assessor had jurisdiction to assess, and the assessment should not be interfered with by the Court: *London Mutual Ins. Co. v. City of London* (1887), 15 A.R. 629. The question is one of amount only, and the result has been passed upon by the county Judge, and must stand: *Scragg v. The Corporation of the City of London* (1867), 26 U.C.R. 263; *The Corporation of the City of Toronto v. The Great Western R.W. Co.* (1866), 25 U.C.R. 570. All the cases are in harmony on the question of jurisdiction. Where it exists, there is no remedy other than appeal to the court of revision and county Judge. Where it does not exist, the Court will intervene. Jurisdiction having attached in the present case, there should be no interference: *Toronto Street Railway Company v. City of Toronto*, [1904] A.C. 809; *The Corporation of the City of London v. Watt* (1893), 22 S.C.R. 300.

January 17. MULOCK, C.J.:—This is an action for a declaration that a certain assessment by the defendants upon the plaintiffs was illegal, and for an injunction restraining the defendants from enforcing it. Boyd, C., in giving judgment, held that certain mining

plant on the lands in question might be included under the term "buildings," and be taken into consideration by the assessor in fixing the assessable value of the buildings.

From this decision the plaintiffs appeal.

The question arises under the provisions of sec. 36 of the Assessment Act, 4 Edw. VII. ch. 23 (O.), which is as follows:—

Sub-sec. 1: "Except in the case of mineral lands hereinafter provided for, real property shall be assessed at its actual value."

Sub-sec. 2: "In assessing land having any buildings thereon, the value of the land and buildings shall be ascertained separately, and shall be set down separately in columns 13 and 14 of the assessment roll and the assessment shall be the sum of such values. The value of the buildings shall be the amount by which the value of the land is thereby increased."

Sub-sec. 3: "In estimating the value of mineral lands, such lands and the buildings thereon shall be valued and estimated at the value of other lands in the neighbourhood for agricultural purposes, but the income derived from any mine or mineral work shall be subject to taxation in the same manner as other incomes under this Act."

The mining plant consisted of certain derricks, tanks, pipes, jekers, triangles, and other appliances not adding to the value of the lands for agricultural purposes, but used only in connection with the production of oil from said lands.

It was conceded in argument that the lands in question were "mineral lands" within the meaning of the Act.

In addition to this plant, there were certain buildings on the land, but the plant, in respect of which this issue arises, was not in nor did it form part of these buildings, but was distributed throughout the lands where oil wells were being operated.

The real question for determination is whether, under these circumstances, this plant is assessable.

Under sub-sec. 1 of sec. 36 "real property" other than mineral lands is to be assessed at its actual value, whilst mineral lands, according to the provisions of sub-sec. 3, are to be assessed on a different principle. That sub-section contemplates another source of taxation in respect of mineral lands, namely, the income derived from the mine, and accordingly, in effect, declares that for the purpose of assessment the value of mineral lands and all improvements

D. C.

1907

CANADIAN  
OIL FIELDS  
Co.

v.  
VILLAGE  
OF OIL  
SPRINGS.

Mulock, C.J.



D. C.

1907

CANADIAN  
OIL FIELDS  
Co.v.  
VILLAGE  
OF OIL  
SPRINGS.

Mulock, C.J.

thereon shall be their value for agricultural purposes; that, in fixing their assessable value, due regard shall be had to the value for agricultural purposes only of lands in the neighbourhood; and that, as respect any value in mineral lands above that amount, the same shall be exempt from assessment, but, in lieu thereof, the income derivable therefrom shall be assessable. The statute does not make such exemption contingent on there being any income, but it is unqualified and absolute.

The evidence shews that the assessor assessed here the actual land at \$25 an acre (being the estimated value of other lands in the neighbourhood for agricultural purposes). He also assessed the actual buildings at a certain other sum and also assessed the mining plant, not as giving any value to the land for agricultural purposes, but as mining plant at \$2,250, and added this amount to the assessed value of the buildings, and set down the combined amounts as one sum in column 14 of the assessment roll as the assessed value of the buildings. The plaintiffs complain of this assessment of their mining plant.

In addition to contending that it is assessable, the defendants point to the assessment roll, and say that the plaintiffs complain merely of over-assessment, and are merely seeking a reduction of the amount assessed against their buildings, and contend that the only machinery competent to deal with such complaint is that provided by the Assessment Act.

I am unable to accede to that view. The method attacked seems to me a transparent attempt to evade the fair meaning of the Act. The question is not one of more or less regarding assessable value, but whether the provisions of the Act can be defeated by the assessable value of property exempt from taxation being added to that of property liable to taxation in the assessment roll. The assessment of the exempted property was wholly illegal; that item of unassessable property is as clearly distinguishable from the assessable as if we were dealing with two separate properties, one assessable and the other not, and it was not for the assessor, in the exercise of his judgment, to assess it for taxation at any amount whatever. The illegality being beyond question established, the Court has jurisdiction to deal with it.

I, therefore, think this appeal should be allowed with costs. It appears that there was an appeal from the court of revision to the county court Judge, who gave judgment in respect of assessment

of the buildings directing certain change in the assessment roll. By a clerical error, the roll was not corrected, but the rectification was provided for in the judgment of the learned Chancellor, no costs being given in connection with that branch of the case. I do not think his disposition of those costs should be disturbed, but with that exception think the plaintiffs are entitled to their costs of this action.

ANGLIN, J.:—I agree in the result. Sub-sec. 3 of sec. 36 of the Assessment Act does not explicitly exempt mining plant from assessment. But, because the statute prescribes an exclusive standard of valuation which can have no possible application to such plant, its owners necessarily receive the benefit of an exemption which it may not have been the intention of the Legislature to confer.

It is inconceivable that such plant as is here in question could enhance in the slightest the value for agricultural purposes of the land in and upon which it is erected. Only in that event, if at all, could the assessor take it into account in determining the assessable value of the mineral lands. But the direction that these lands "shall be valued and estimated at the value of other lands in the neighbourhood for agricultural purposes" seems to require the assessor to ignore any special or peculiar features of the mineral lands which might give them a value distinctly greater even for agricultural purposes than that of "other lands in the neighbourhood."

The assessor exhausted his powers when he fixed as the value of the plaintiffs' land "the value of other lands in the neighbourhood for agricultural purposes." When he added to that amount his valuation of something else, which could only be assessable as part of the land (sec. 2, sub-sec. 7), he not only increased the amount of the assessment of the land, but attempted to render subject to taxation something which the statute, in effect, if not in terms, exempts.

Although the court of revision is, subject to appeal, the appropriate and, in fact, the only forum in which the taxpayer can seek redress for an assessment excessive in amount, the owner of property not liable to taxation and which has been illegally assessed is entitled to ask this Court to relieve him of the burden thus improperly imposed.

TEETZEL, J., concurred with MULOCK, C.J.

G. A. B.

D. C.  
1907  
CANADIAN  
OIL FIELDS  
Co.  
v.  
VILLAGE  
OF OIL  
SPRINGS.  
Anglin, J.

[MACMAHON, J.]

1906

CARTON V. WILSON.

Dec. 12.

*Vendor and Purchaser—Contract for Sale of Land—Specific Performance—Option—Absence of Consideration—Right to Withdraw Before Acceptance—Company—Notice of Withdrawal.*

An option by the defendant, for which he received no consideration, was given to a company on two parcels of land, and contained the statement that "this offer is open and irrevocable for six months from the date hereof." Before the option expired, it not having been in the meantime accepted, the defendant handed to the company's secretary a letter addressed to him by name, but not designating him as such, stating that the option was withdrawn. The secretary, while intimating that he did not think the plaintiff had the power to withdraw, stated that there would shortly be a meeting of the company, when the option would likely be accepted. The company met and accepted the option for both lots, which they assigned over to the plaintiff, who brought an action for specific performance of the alleged agreement to sell:—

*Held*, that the action was not maintainable, for there being no consideration for the option, the defendant had the right to withdraw it.

*Held*, also, that the letter of withdrawal must be deemed to have been given to and received by the secretary in his capacity of secretary.

THIS was an action for specific performance of an alleged contract of sale of certain lands.

The action was tried before MACMAHON, J., at the sittings at Peterborough on the 22nd November, 1906.

A. P. Poussette, K.C., and G. Edminson, K.C., for the plaintiff.  
D. O'Connell, for the defendant.

The learned Judge reserved his decision, and subsequently delivered the following judgment, in which the facts are fully stated.

December 12. MACMAHON, J.:—The Trent Valley 'Sugar Provision and Cold Storage Company, Limited, was incorporated under the Ontario Joint Stock Companies Letters Patent Act.

At a meeting of the provisional board of directors, held on the 23rd September, 1905, Mr. J. E. Dixon was by resolution appointed president, and Mr. A. P. Poussette secretary, and Messrs. Edminson and Dixon solicitors of the company.

After appointing the officers of the company, and on the same day, the directors passed by-law No. 1, entitled "A by-law to

regulate the affairs of the company," to which is attached the seal of the company attested by A. E. Dixon, the president, and A. P. Poussette, the secretary.

MacMahon, J.  
1906

CARTON  
v.  
WILSON,

Section 1 of the by-law provides that the affairs of the company shall be managed by five directors, of whom not less than three shall constitute a quorum.

By section 15, the officers of the company to be appointed by the board of directors shall consist of a secretary, manager, and such other officers as the board may deem advisable.

On the 24th March, 1906, Mr. Poussette, the secretary, and George Carton (the husband of the plaintiff), who acted as underwriter for the company, went together to the defendant and obtained from him the following offer:—

"To the Trent Valley Sugar Provision and Cold Storage Company Limited:

"I hereby offer you my property, park lots Nos. 12 and 13 in lot No. 14, in the 11th concession of North Monaghan, at the price of six thousand dollars, and in the alternative said park lot No. 12 at the price of three thousand dollars. This offer is to be open and irrevocable for six months from the date hereof, and subject to the condition that I am to have the right to take off this year's crop. If the boundary between lots 12 and 13 turns out to be north of my house I am to have the land covered by my house.

"Dated March 24th, 1906.

"(Signed) Hermon Wilson."

The offer not having been accepted, the defendant on the 12th September handed to Mr. A. P. Poussette the following letter:

"A. P. Poussette, Esq., K.C.,

"Peterborough.

"Dear Sir:—

"Please take notice that the option which I gave you and Mr. George Carton last spring covering land in Monaghan is withdrawn.

"(Signed) Hermon Wilson."

When the defendant handed the letter to Mr. Poussette, the latter told the defendant he did not think he could withdraw the option. The defendant replied that that was what it meant. Mr. Poussette then said that Mr. Carton would be back on Saturday the 15th, and he would see him about it, and there would be



MacMahon, J.

1906

CARTON

v.

WILSON.

a meeting of the directors on the 15th, and the option would likely be dealt with at that meeting. The defendant told Poussette that while the option as to both lots was withdrawn, he would be willing to sell the company one of them.

At the directors' meeting on the 15th, no action was taken; but at a meeting of the directors on the 17th of September, a motion was carried that the defendant's offer of both lots for \$6,000 be accepted and that he be notified thereof.

This further resolution was then passed by the board:—

"That in the event of the company being unable to provide the necessary funds to take up the option, the president and secretary are hereby authorized to assign the company's right to any person or persons who in their judgment should have the advantage of the option."

On the 19th of September the defendant was sent a notification under the seal of the company, attested by the president and Mr. Poussette, as secretary, that his offer to sell the lots at the price mentioned had been accepted.

The directors then passed a resolution by which the company agreed to assign to Charlotte Carton, wife of George Carton, and on the same day (the 19th of September), the company, in consideration of one dollar, assigned to her all their rights and interest under the said offer and acceptance, and all their right, title and interest in the said lands.

By the action specific performance is sought of what is alleged by the plaintiff to be a binding agreement to sell.

Two questions arise for determination in this case: First, did the offer of the defendant by reason of its containing the words "to be open and irrevocable for six months" prevent its withdrawal or revocation by the defendant prior to acceptance within the time limited? Second, was the service of notice of retraction on Mr. Poussette, the secretary of the company, sufficient notice?

As to the first question, it was admitted that there was no consideration moving from the company to the defendant for the offer made by him. And Mr. Pollock, in his work on Contracts, 7th ed., p. 26, says: "An offer may be revoked at any time before acceptance but not afterwards. For before acceptance there is no agreement and therefore the proposer cannot be bound to anything. So that even if he purports to give a definite time for

acceptance, he is free to withdraw his proposal before that time has elapsed. He is not bound to keep it open unless there is a distinct contract to that effect founded on a distinct consideration."

The words "to be open and irrevocable for six months" cannot, in my opinion, alter the rights or power of the person making the proposal, for it is not the less a *nudum pactum*, although having these words in it, and is not binding on the promisor.

In *Dickinson v. Dodds* (1876), 2 Ch.D. 463, at p. 464, the defendant Dodds signed the following agreement: "I hereby agree to sell to Mr. George Dickinson the whole of the dwelling houses and outbuildings thereto belonging situate at Croft, belonging to me, for the sum of £800. . . P.S.: This offer to be left over until Friday, 9 o'clock a.m., the 12th June, 1874."

It was held by the Court of Appeal that the document amounted only to an offer to sell, which might be withdrawn at any time before acceptance, and that a sale to a third person which came to the knowledge of the person to whom the offer was made was an effectual withdrawal of the offer.

Lord Justice Mellish, in his judgment, at p. 473, says: "I am clearly of opinion that it was only an offer, although it is, in the first part of it, independently of the postscript, worded as an agreement. I apprehend that, until acceptance, so that both parties are bound, even though an instrument is so worded as to express that both parties agree, it is in point of law only an offer, and, until both parties are bound, neither party is bound. It is not necessary that both parties should be bound within the Statute of Frauds, for, if one party makes an offer in writing, and the other accepts it verbally, that will be sufficient to bind the person who has signed the written document. But, if there be no agreement, either verbally or in writing, then, until acceptance, it is in point of law an offer only, although worded as if it were an agreement."

See *Warner v. Wellington* (1856), 3 Drew. 523, and also *Larkin v. Gardiner* (1895), 27 O.R. 125, and the cases there cited.

As to the second question, Consolidated Rule 159 reads: "Where a corporation is a party to a cause or matter a writ of summons or other document may be served on the . . . president or other head officer . . . or on the cashier, treasurer or secretary, clerk or agent of such corporation."

MacMahon, J.

1906

CARTON

v.

WILSON.

MacMahon, J.

1906

CARTON

v.

WILSON.

Lord Blackburn, in *Newby v. Von Oppen, et al.* (1872), L.R. 7 Q.B. 293, at p. 296, said: "At common law the service of a writ on a corporation aggregate, which from the nature of the body could not be personal, was by serving it on a proper officer so as to secure that it came to the knowledge of the corporation."

As the Rule makes the service of process on the president or secretary good service on a corporation, service of notice of revocation on the secretary of the plaintiff company must be good service.

It was argued that as the letter of revocation was addressed "A. P. Poussette, K.C.," and not to him "as secretary of the company," that notice of the revocation could not be imputed to the company. That argument appears to me to be very far fetched. The letter of revocation refers to the option given to "you" (Mr. Poussette) "and George Carton," which option was written by Mr. Poussette, who was the secretary of the company, and was addressed to the company. And Mr. Poussette knew the letter of revocation was intended for the company, for when it was delivered to him he said that the question of the option would be brought up at the directors' meeting on the 15th September, and he cannot now be allowed to say that he did not receive the letter of revocation on behalf of the company or that its receipt by him was not notice to the company.

As the option was revoked before the company passed the resolution to accept, the company had no right or power to assign the option to the plaintiff (Mrs. Carton), and the action must therefore be dismissed with costs.

G. F. H.

## [DIVISIONAL COURT.]

RE THE CORPORATION OF THE TOWNSHIP OF AMELIASBURG

V.

PITCHER ET AL.

D.C.

1906

Dec. 24.

*Prohibition—Division Courts—Interpretation of Statute—Jurisdiction.*

Where it is necessary to interpret a statute, in order to find out whether the division court should decide the rights of the parties at all, then if the division court Judge misinterprets the statute and so gives himself jurisdiction to decide such rights, prohibition will lie; but if it be necessary to interpret a statute, simply to decide the rights of the parties, prohibition will not lie, however far astray the division court Judge may go.

*In re Long Point Company v. Anderson* (1891), 18 A.R. 401, followed.

THIS was an appeal from a judgment of Meredith, C.J.C.P., in Chambers, refusing an order prohibiting the plaintiffs from taking any further proceedings in the above action in the fourth division court in the county of Prince Edward.

The action was brought by the corporation against the two defendants Frank Pitcher and M. S. Pitcher, father and mother of an infant, who had been isolated and furnished with medical attendance and necessities while suffering from smallpox, under sec. 93 of the Public Health Act, R.S.O. 1897, ch. 248, by the local board of health of the township, who had expended a sum much in excess of the \$100 sued for, but had abandoned the excess in the action.

The action was tried on the 4th of October, 1906, at Picton, before His Honour Judge Morrison, county Judge of the county of Prince Edward, who gave judgment against both defendants, the wife being a married woman possessed of separate estate, holding that the word "necessaries" in sec. 93 included medical attendance and that the word "parents" included both the father and mother. A motion was made for a new trial; on its argument the judgment was set aside as against the father, and affirmed as to the mother.

A motion was then made by the wife for prohibition, which was heard on the 11th of December, 1906, by Meredith, C.J., who refused the order and dismissed the motion without costs.



D. C.

1906

TOWNSHIP  
OF  
AMELIAS-  
BURG  
v.  
PITCHER.

From this judgment the defendant, the wife, appealed to a Divisional Court, and the appeal was argued on the 20th of December, 1906, before FALCONBRIDGE, C.J.K.B., BRITTON, and RIDDELL, JJ.

*C. J. Holman*, K.C., for the appeal. At common law there is no legal obligation on the part of parents to maintain their children, the duty is only a moral one: *Bazley v. Forder* (1868), L.R. 3 Q.B. 559 at p. 565; *Wright v. McCabe* (1899), 30 O.R. 390. The county Judge misconstrued the statute, and prohibition should go. This case cannot be distinguished from *Re McInnes v. McGaw* (1898), 30 O.R. 38, or from *The Queen v. The Judge of the County Court of Lincolnshire* (1887), 20 Q.B.D. 167, which latter case was referred to with approval in *In re Long Point Company v. Anderson* (1891), 18 A.R. 401; *Re Sims v. Kelly* (1890), 20 O.R. 291; *Re Macfie v. Hutchinson* (1887), 12 P.R. 167. *In re Long Point Company v. Anderson*, 18 A.R. 401, turned upon the particular facts of that case, and Mr. Justice Osler, at pp. 407, 408, sets forth correctly the state of the law on this question of prohibition. Section 93 of ch. 248, R.S.O. 1897, the Public Health Act, does not provide that the parent shall pay the outlay, but that the local board of health may, if a patient has smallpox, provide nurses and necessaries "at his own cost and charge or the cost of his parents or other person or persons liable for support if able to pay the same, otherwise at the cost and charge of the municipality." This does not create a new liability, and only decides that the parents or other persons are to pay if liable for support. But the parents (much less the mother) are not liable for the support. The father is the natural guardian of the child and entitled to its custody. Here the father has been relieved of liability in the division court, but the mother, upon whom rested no liability at common law, has been held liable: *Simpson on Infants*, p. 158. There is no jurisdiction in the division court to entertain this action, as the total amount of the balance of the account exceeded the limit in the statute.

*W. S. Morden*, called on, on the question of jurisdiction, contra. *In re Long Point Company v. Anderson*, 18 A.R. 401, fully covers this case, and shews that prohibition cannot be granted. I especially rely upon the judgment of Meredith, J.A., at p. 410 *et seq.*

December 24. FALCONBRIDGE, C.J.:—I agree that the case is entirely covered and governed by *In re Long Point Company v. Anderson*, 18 A.R. 401.

In one sense, every judgment involving the construction of a statute includes and implies an assertion of jurisdiction in the Judge to try the case. But in no other sense and to no greater extent does the learned Judge in this case give himself jurisdiction by his construction of the statute.

The appeal must be dismissed with costs.

BRITTON, J.:—Upon a careful reading of *In re Long Point Company v. Anderson*, 18 A.R. 401, I think it conclusive against defendant's right to prohibition in the matter of this plaint.

The Public Health Act, R.S.O. 1897, ch. 248, sec. 93, creates (so the plaintiffs say) a liability upon the defendant in favour of the plaintiffs. If it does, or if the plaintiffs are of the opinion it does, they have the right to sue for it, and in the proper Court according to law. The amount of the plaintiffs' claim in this case is within the competency of the division court, so the plaintiffs may proceed in that Court. They would sue in the county court or the High Court, as might be necessary according to amount.

There is no question of construing this sec. 93 to determine the question of jurisdiction to try—the Judge must do that, to determine liability—and for the purpose of determining liability, error in law will not—any more than mistake upon a question of fact—give a right to prohibition.

I am not able to distinguish this case on principle from the case cited.

Appeal should be dismissed with costs.

RIDDELL, J.:—The action was brought in the division court claiming payment by the defendant as mother of a person infected, for whom expenses had been incurred under sec. 93 of the Public Health Act, R.S.O. 1897, ch. 248. Judgment was given by the county Judge in favour of the plaintiffs for \$100, the amount claimed. A motion for prohibition being brought on before the Chief Justice of the Common Pleas, it was refused.

Several grounds were taken before us, all but one of which we disposed of on the argument. The sole remaining ground is as

D. C.

1906

TOWNSHIP  
OF  
AMELIAS-  
BURG  
v.  
PITCHER.

Falconbridge,  
C.J.

D.C.  
1906

TOWNSHIP  
OF  
AMELIAS-  
BURG  
v.  
PITCHER.  
Riddell, J.

follows: It is argued that the learned trial Judge misinterpreted the statute, R.S.O. 1897, ch. 248; that this statute gave no cause of action; and that, therefore, he had no jurisdiction.

I do not think that this position is sound. I think the true rule established by *In re Long Point Company v. Anderson*, 18 A.R. 401, and similar cases, is that if it be necessary to interpret a statute in order to find out whether the division court should decide the rights of the parties at all, then if the division court Judge misinterprets the statute and so gives himself jurisdiction to decide such rights, prohibition will lie; but if it be necessary to interpret a statute simply to decide the rights of the parties, prohibition will not lie, however far astray the division court Judge may go.

This case comes within the latter category, and consequently this appeal should be dismissed with costs.

I should add that I do not suggest that the judgment is not right in law; I simply say that this Court has no right to inquire into that question.

G. A. B.

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[IN CHAMBERS.]

VANO V. THE CANADIAN COLOURED COTTON MILLS COMPANY.

1907

Jan. 4.

*Discovery—Next Friend of Infant Plaintiff—Right to Examine—Con. Rules 439, 440—English Order XXXI., Rule 29.*

The next friend of an infant plaintiff is not examinable for discovery.

The distinction between Con. Rules 439, 440, and English Order XXXI., Rule 29, pointed out.

THIS was an appeal from an order of Monck, local Judge. Wentworth, dismissing a motion made by the plaintiff to set aside an appointment issued by the defendants for the examination of one Budimer Protich, the next friend by whom the plaintiff brought this action.

The appeal was heard before ANGLIN, J., in Chambers, on January 4th, 1907.

*J. L. Counsell*, for the plaintiff.

*C. W. Bell*, for the defendants.

January 4. ANGLIN, J.:—The question raised is whether under our code governing discovery the next friend of an infant litigant is examinable for discovery.

The plaintiff is sixteen years of age, and it is not denied that he is capable of being examined. The defendants assert an absolute right to examine the next friend as a party to the litigation adverse in interest to themselves.

That an infant plaintiff, if of capacity to give evidence, is examinable for discovery is now well established: *Arnold v. Playter* (1892), 14 P.R. 399; *Flett v. Coulter* (1902), 4 O.L.R. 714.

Our Rule 439 renders liable to examination for discovery "a party to an action or issue whether plaintiff or defendant." English Order XXXI., Rule 1, permits a plaintiff or defendant by leave of the Court to examine by interrogatories "the opposite parties or any one or more of such parties."

Though, under the English practice, an infant party could not formerly be compelled to give discovery: *Curtis v. Mundy* [1892], 2 Q.B. 178; *Mayor v. Collins* (1890), 24 Q.B.D. 361, it was held



Anglin, J.

1907

VANO

v.

CANADIAN  
COLOURED  
COTTON  
MILLS  
Co.

that the next friend of an infant was not "a party to the action," within the meaning of the English Rule to which I have referred, from whom a party opposite in interest to the infant could compel discovery: *Re Corsellis* (1883), 48 L.T.N.S. 425.

This inability to secure any discovery from an infant litigant led to the adoption in England, in November, 1893, of what is now Rule 29 of Order XXXI., which extends the application of that Order expressly to "infant plaintiffs and defendants and to their next friends and guardians *ad litem*." Our code of Rules contains no corresponding provision. The words of our Rule, "party to an action or issue whether plaintiff or defendant," are no wider than the words of Rule 1 of the English Order, "the opposite parties or any one or more of such parties." The next friend of an infant litigant, if not covered by these later words, is not within the former. He "is not a party to the action, he is simply put there to protect the interest of the infant and to shew that the action is of such a nature that he is willing to guarantee costs, and in making himself liable for costs he is in no way a party to the action, and I have no jurisdiction to make an order on him as if he were a party": *Dyke v. Stephens* (1885), 30 Ch.D. 189, 190.

Neither is the next friend "a person for whose immediate benefit an action is prosecuted or defended" within the purview of Rule 440.

The appeal will be allowed and the appointment for examination of the next friend will be set aside. The costs of the appeal and of the motion before the local Judge will be to the plaintiff in any event of the action.

G. F. H.

## [DIVISIONAL COURT.]

BRENNER ET AL. V. TORONTO R.W. CO.

D. C.

1907

Jan. 25.

*Negligence—Contributory Negligence—“Ultimate” Negligence—Street Railway—Injury to Person Crossing Track—Neglect of Motorman to Shut off Power on Approaching Crossing—Rule of Company—Withdrawal from Jury—Misdirection.*

Negligence of a defendant incapacitating him from taking due care to avoid the consequences of the plaintiff's negligence, may, in some cases, though anterior in point of time to the plaintiff's negligence, constitute “ultimate” negligence, rendering the defendant liable notwithstanding a finding of contributory negligence of the plaintiff. Such anterior default of the defendant is “ultimate” negligence when it renders inefficient to avert injury to the plaintiff means employed by the defendant after danger became apparent, and which would otherwise have proved adequate to prevent the mischief, or renders the defendant wholly incapable of employing such means, though time was afforded for his using them efficaciously but for such disabling negligence.

*Scott v. Dublin and Wicklow R.W. Co.* (1861), 11 Ir. C.L.R. 377, approved.

*Radley v. London and North Western R.W. Co.* (1876), 1 App. Cas. 754, applied.

The plaintiff in crossing a city street in front of an approaching motor-car of the defendants was admittedly guilty of negligence or contributory negligence, but, on the evidence, would have crossed safely if a moment more had been allowed her. As it was, she was struck by the corner of the car fender and injured. There was evidence of a rule of the defendants that motormen were to shut off power at a certain distance before reaching a crossing, and that the motorman on this occasion did not do so, and in an action for the defendants' negligence causing the plaintiff's injuries the trial Judge in his charge to the jury withdrew the evidence of this rule from their consideration:—

*Held*, that the place where the plaintiff attempted to cross was a crossing, being opposite a street running at right angles to the street upon which the car was being operated, though not an intersecting street; and the withdrawal of the evidence as to the rule was misdirection, and misdirection which might have affected the result; the jury might, upon the evidence, have found that, but for the motorman's failure sooner to shut off power, or to reduce speed, the momentum of the car would have been so lessened that he could, with the emergency appliance at his command, have avoided running down the plaintiff; and this failure, though anterior to the plaintiff's negligence, would be “ultimate” negligence, within the meaning of the rule which makes a defendant liable, notwithstanding contributory negligence of the plaintiff, if in the result he (the defendant) could by the exercise of ordinary care have avoided the mischief.

APPEAL by the plaintiffs from the judgment of Magee, J., upon the findings of a jury, dismissing the action, which was brought to recover damages for personal injuries sustained by the plaintiff Eva Brenner, who was struck by a car of the defendants when crossing a street in the city of Toronto, owing to the negligence of the defendants, as the plaintiffs alleged, and for expenses occasioned to her father, the other plaintiff, in consequence of her injuries. The facts and the arguments of counsel are stated in the judgments.

D. C.  
1907  
BRENNER  
v.  
TORONTO  
R.W.Co.

The appeal was heard by a Divisional Court composed of MULOCK, C.J. Ex.D., ANGLIN and CLUTE, JJ., on the 11th, 12th, and 13th December, 1906.

*W. R. Smyth*, for the plaintiffs.

*Wallace Nesbitt*, K.C., and *D. L. McCarthy*, for the defendants.

In addition to cases cited in the judgments, the following were referred to by counsel: *Derochie v. Town of Cornwall* (1893-4), 23 O.R. 355, 360, 21 A.R. 279; *S.C.*, *sub nom. Town of Cornwall v. Derochie* (1895), 24 S.C.R. 301; *Ford v. Lacy* (1861), 7 H. & N. 151; *Great Western R.W. Co. of Canada v. Braid* (1863), 1 Moo. P.C. N.S. 101; *Wells v. Lindop* (1888), 15 A.R. 695; *Grieve v. Molsons Bank* (1885), 8 O.R. 162; *Dunsmuir v. Lowenberg* (1903), 34 S.C.R. 228; *Hunter v. Grand Trunk R.W. Co.* (1895), 16 P.R. 385.

January 25. ANGLIN, J.:—The plaintiffs, father and daughter, appeal from the judgment of Magee, J., entered upon the findings of a jury, in favour of the defendants, and seek a new trial of this action, on the ground of alleged misdirection of the jury by the learned trial Judge.

About nine o'clock in the evening of the 9th July, 1905, the female plaintiff, a Russian Jewess, aged 18 years, in crossing the tracks of the defendant railway company in Queen street, opposite University avenue, was run down by a west-bound street car. She lost both her left arm and left leg. Though finding for the defendants, the jury assessed damages contingently—to the girl \$5,000 and to her father \$600. Their other findings were as follows:—

"1. Q. Were the defendants or their motorman guilty of negligence which resulted in injury to the plaintiff Eva Brenner? A. No.

"2. Q. If so, wherein did such negligence consist? (Not answered).

"3. Q. Could the plaintiff Eva Brenner by the exercise of reasonable care have avoided the injury? A. Yes.

"4. Q. If so, wherein did she fail to exercise reasonable care? A. By neglecting to take proper precautions necessary in crossing the road.

"5. Q. If she failed to exercise reasonable care, did the motorman fail to exercise reasonable care to avoid injury to her? A. No.

"6. Q. If so, wherein did he fail to exercise reasonable care?  
A. Cannot see wherein he failed."

The finding of contributory negligence is not challenged by the appellants. They concede that there was evidence to support it, and they take no exception to the learned Judge's charge upon this branch of the case. It is therefore apparent that, even should we be of opinion that the attack made upon the finding of absence of primary negligence on the part of the defendants is well founded, we could not upon that ground afford relief to the appellants. This renders it unnecessary to consider alleged misdirection in regard to the question of excessive speed, or want of control on the part of the motorman, as bearing upon the question of such primary negligence.

Since the House of Lords decided *Radley v. London and North Western R.W. Co.* (1876), 1 App. Cas. 754, it must, in our Courts, be deemed an incontrovertible proposition that, notwithstanding proven contributory negligence of the plaintiff, "if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him." As a convenient and concise term to express negligence of this description, I shall call it "ultimate negligence."

A finding of contributory negligence, involving the proposition that the plaintiff's negligence was proximate and efficient in its character, is logically no more incompatible with or exclusive of a finding of "ultimate" negligence on the part of the defendants than is the finding of primary negligence of the defendants, which likewise involves the proposition that such primary negligence was a proximate and efficient cause, incompatible with or exclusive of a finding of contributory negligence on the part of the plaintiff: *London Street R.W. Co. v. Brown* (1901), 31 S.C.R. 642; *Brown v. London Street R.W. Co.* (1901), 2 O.L.R. 53.

The appellants make a very serious attack upon the charge of the trial Judge as it affected the question of "ultimate" negligence on the part of the defendants.

Eva Brenner was crossing Queen street in a north-westerly direction. She had almost cleared the west-bound car, when she was struck by the north-western corner of its fender. Had another moment been allowed her, she would have escaped injury. Could

D. C.

1907

BRENNER

v.

TORONTO

R.W.Co.

Anglin, J.



D.C.  
1907  
BRENNER  
v.  
TORONTO  
R.W.Co.  
Anglin, J.

the defendants by the exercise of ordinary and reasonable care have afforded her that additional moment? If they could, they might in the result have avoided the mischief, and her negligence in crossing should not excuse them. The jury have in effect found that they could not. Unless that finding should be set aside this appeal necessarily fails.

In support of their charge of "ultimate" negligence against the defendants, the plaintiffs urge five things: 1st, that the gong was not sounded; 2nd, that the fender was improperly adjusted, being too high from the ground at one corner; 3rd, that after the girl's danger became apparent the motorman did not keep his car under "the reverse;" 4th, that but for the excessive speed of the car the motorman's efforts to avoid running down the girl would have been successful; 5th, that, but for the motorman's failure to throw off the power propelling his car at a proper distance east of University street, the momentum of the car would have been so reduced that he could have avoided injury to the plaintiff.

The first four grounds of negligence were set up in the record. The fifth ground was not specifically alleged. The first and third grounds were fairly left to the jury, and their fifth finding must be taken to mean that the gong was sounded, and that the throwing off of the reverse was not negligent, or, if it was negligent, then that the mischief would not have been prevented had the reverse not been thrown off. In either view, the plaintiffs are concluded as to these points by the finding.

The learned Judge's reference to the evidence as to the condition of the fender may not at one point have been quite accurate, but, in view of the fact that the girl did not pass under the fender but was thrown off by it to the north, a jury should not be asked to find that improper adjustment of the fender caused the mischief, or that it would have been prevented had the fender hung nearer to the ground.

Upon the question of excessive speed (excluding for the moment the bearing upon that issue of the want of proper control, alleged in the fifth ground), the conflicting evidence was fairly presented to the jury. Any omission by the learned Judge to direct the attention of the jury to the bearing upon this question of the fact that after striking the plaintiff the car ran a considerable distance before it was stopped, and any misapprehension which his remarks

upon the motorman's explanation of that fact might have occasioned, were fully and satisfactorily cured when the jury was recalled and specifically charged as to this portion of the evidence and its bearing on the question of speed. In regard to this fourth ground, therefore (except in so far as it is involved in or involves the fifth ground), the plaintiffs have no cause for complaint.

The fifth ground of alleged "ultimate" negligence rests upon the following evidence. The defendants' rule No. 58, for the guidance of motormen, is in these terms: "Curves and crossings: In approaching crossings and crowded places where there is a possibility of accident the speed must be reduced and the car got carefully under control."

James Whitehead, a witness called for the defence, and who describes himself as an instructor of motormen, when dealing with this rule, says that motormen are supposed to shut off power in approaching all cross streets: if running six miles an hour, at a distance of 60, 80, or 100 feet away from the street crossings; at ten miles an hour, 20 or 30 feet sooner; and at 15 miles an hour, "20 to 30 feet farther back still." This witness further says that in approaching the corner of University street, having had full power on after leaving York street, as a competent man he would shut off his power 40 or 50 feet before reaching the corner of University street. There is strong evidence that the speed was not less than six miles an hour. The motorman Lewis, who had charge of the car in question, says first that he ran with power on until he reached University street; and, later, that he did not throw the power off until opposite the bicycle path which runs down the east side of University avenue. In other words, instead of throwing off his power 40 or 50 feet east of University street, he kept on the power while passing that street and until he had reached the east limit of University avenue, 87 feet west of the east side of University street. If he should have thrown off the power 40 feet east of University street—or of the south-west corner of the Osgoode Hall grounds—he kept his power on, according to his own evidence, for at least 127 feet after it should have been shut off. Had the power been off while the car travelled this 127 feet, its momentum must have been materially lessened, and it seems impossible to say that, if, with the greater momentum, the use of the emergency appliances after the motorman realized the girl's danger so nearly

D. C.

1907

BRENNER

v.

TORONTO

R. W. Co.

Anglin, J.

D. C.  
1907

BRENNER  
v.  
TORONTO  
R.W.Co.

Anglin, J.

enabled him to save her, a jury might not reasonably find that, with a reduced momentum, the motorman could have avoided the mischief. If, when the emergency arose, the motorman did everything then in his power to permit the unfortunate girl to escape, and if the maintenance of the higher momentum at the moment of the emergency might be ascribed to the failure to shut off the power at the proper point, a jury might well conclude that by that omission the motorman had put it out of his power to prevent the occurrence by the use of appliances at his command, which would otherwise have proved effective.

Upon this state of facts two questions must be answered: 1st, was the question which arises upon the evidence above epitomized fairly presented for the consideration of the jury? 2nd, assuming that the degree of momentum which the motorman found himself unable to overcome should be ascribed to his failure to shut off power at an earlier point of time, and that such omission should be deemed negligence, can that omission, which occurred before the plaintiff's danger manifested itself, though its operation and effect continued up to the very moment of the injury, be deemed negligence which renders the defendants liable, notwithstanding the plaintiff's contributory negligence, because in the result the former might, but for this continuing though anterior negligence, have avoided the mischief?

That the duty of care which the defendants owe to persons using the streets of the city depends upon common law or statutory obligation, and not upon rules promulgated by themselves for the government of their employees, may be deemed axiomatic. But that such rules, when they concern the management of cars in matters affecting the safety of persons using the streets, afford evidence, as against the defendants, of a standard of reasonableness in regard to the subjects covered by them, which should not be withdrawn from the consideration of a jury, is also well established: *Preston v. Toronto R.W. Co.* (1905), 11 O.L.R. 56, 59, 13 O.L.R. 369. Except, perhaps, as affecting the weight which a jury should attach to them, it matters little in what form such rules are communicated to the employees—whether in print or writing or as oral directions given by an instructor. There was evidence here of a rule or direction regarding the reduction of speed, the control of the car, and the shutting off of power, which the motorman



Lewis did not observe. He did not reduce the speed of his car when approaching the crossing; neither did he shut off his power.

Counsel for the defendants argued that this rule or direction does not apply to the case where an approaching street terminates at the street upon which the car is running and is not continued beyond it. Having regard to the obvious purpose and nature of the rule or direction, it should not, in my opinion, be so restricted in its application. Persons walking or driving on the south side of Queen street and desiring to proceed up University street or University avenue are obliged to cross Queen street just as they would if University street or University avenue extended south, of Queen street. In like manner persons coming down the avenue, and wishing to proceed to and along the south side of Queen street, must cross the tracks of the defendants. I find the following definitions of "crossing:" in the Century dictionary, "the place at which a road is or may be crossed or passed over;" in the Standard dictionary, "the place where a roadway may be crossed, as a street crossing;" and in Murray's dictionary, "the place at which a street is crossed by passengers." That the foot of University street is a place at which Queen street may be and is crossed by passengers and vehicles admits of no question. The use of the term "intersection" elsewhere in the rules of the defendants also indicates the wider meaning as that intended to be given to the word "crossings" employed in the rule now under consideration. See *Williams v. Richards* (1852), 3 C. & K 81.

Was this rule or direction in regard to throwing off power when approaching crossings properly submitted to the jury as evidence of what should be deemed reasonable care, or was that evidence practically and in effect withdrawn from their consideration? In his original charge the learned Judge made no allusion to this rule. But before the jury retired the following proceedings took place:—

"Mr. Smyth: Then I would ask your Lordship to charge the jury that, in addition to the original negligence you spoke of, there was evidence from the motorman himself that he had not the car under control, according to the proper method of running as given by the witnesses for the defence themselves. Your Lordship will remember that the witnesses Whitehead and Cosgrove both said that the proper way to run the car was to turn off the power 100 feet east of Osgoode Hall corner, and the motorman himself says

D. C.

1907

BRENNER

v

TORONTO  
R. W. Co.

Anglin, J.



D.C.  
1907  
BRENNER  
v.  
TORONTO  
R.W.Co.  
Anglin, J.

that he did not turn off the power until immediately **before** the accident. They both also said that the proper way to run it was to get the car under control when approaching the corner, by slackening the speed. The motorman says he did not put on the brake until he saw the girl would be run over.

"His Lordship: It is not a question, gentlemen of the jury, as to the motorman's duty under the rule, it is a question of what is reasonable for him to do. He may break the rules four hundred times a day, but the question is whether under the particular circumstances of the case he acted reasonably, just as any other man going on the road. You heard, however, what he said, that he sounded the gong before he got to the west fence of Osgoode Hall, and then you heard that he had not slowed down because he was not going at a speed which he thought called for that.

"Mr. Smyth: There was the evidence of the witness who said that he ought to have taken off the power.

"His Lordship: It was said that he should have taken off the power in order to stop the car, but the motorman swears that he did throw off the power and used the gong; in fact it was said by all the witnesses that you cannot reverse until you have thrown off the power.

"Mr. Smyth: The motorman says he did that at a place a few feet short of the scene of the accident. What I have reference to is the original negligence. and the statement of the defendants' witnesses is that if running the car properly he should have thrown off the power and let the car roll a distance of 100 feet east of Osgoode Hall corner. He admittedly did not do that until long past that point, down here somewhere.

"His Lordship: Some of the witnesses say that in approaching a cross street the motorman should throw off the power so as to get the car under control. Some of them say they would do it 100 feet away, and one man said he would consider forty or fifty feet sufficient.

"His Lordship (to the jury): It is said that ordinarily it would be the duty of the motorman to throw the power off before approaching the corner, so as to let the car roll, that he would then be in a better position to have the car under control, and, if necessary, to stop. Under the rules and under the practice of the company it is the duty of the motorman to throw off the power, ordin-

arily, before approaching a corner, so as to be ready to get the car under control, and more readily to have it under control. But the question is, was he going at such a speed as was excessive. It is not a question of what the rule was, but was he acting improperly in going at an excessive speed at the time.

"Mr. Smyth: Then I would ask your Lordship to charge the jury that there was evidence that the motorman should have had his car under control at an earlier period than the period when he had it under control.

"His Lordship: I think I have already said that."

After the jury had retired Mr. Smyth renewed his objection as follows:—

"Then your Lordship spoke about the only negligence which the motorman could possibly be guilty of at the moment prior to the accident being in not dropping the fender and not applying the sand. What I say about that is this, that on the evidence of the defendants' own witnesses it was the duty of this man to have had his car under a greater degree of control than he apparently had, that if he had had it under that degree of control he would have been able to stop it.

"His Lordship: His duty to the company has nothing to do with his duty to the plaintiff, which was to act reasonably."

Mr. McCarthy, for the defendants, then took this objection which I subjoin with the learned Judge's reply:—

"Then I take objection to your Lordship charging at my learned friend's request. There is no rule of the defendant company which compels the motorman to throw off the power when approaching a street crossing, and I further object that, even if there was, it was not evidence of negligence in this case, inasmuch as he might have thrown off his power before he arrived at University street, and have had on his power again before arriving at the point of contact. There is no evidence of any rule of the defendant company in that regard, and, even if he had not thrown it off or had disobeyed the rule, that there is no evidence that that in any way contributed to this accident.

"His Lordship: I told the jury that the rules of the company had nothing to do with it."

I have thought it better to set out in full the report of this portion of the proceedings, as not a little may depend upon the form, if not

D. C.  
1907  
BRENNER  
v.  
TORONTO  
R. W. Co.  
Anglin, J.

D. C.  
1907  
BRENNER  
v.  
TORONTO  
R. W. Co.  
Anglin, J.

upon the *ipsissima verba*, of the learned Judge's observations. Having with the utmost care read and re-read these passages, which contain the whole charge upon this subject, I am unable to see how the jury could have taken from what was said to them aught else than that they must disregard the testimony as to the defendants' rules and directions to motormen, not only as creating a duty to the public, but also as affording any evidence of what is reasonable care in the running of a car. The learned Judge appears to have been under the impression that this was the purport of his instruction, as evidenced by his reply to Mr. McCarthy. If such be the fair effect of this portion of the charge, it was, in my opinion, misleading, and amounted to a withdrawal from the jury of evidence which they should have been at least permitted, if not directed, to consider.

It is true that the jury were told that the question for their consideration was whether the speed of the car was reasonable in the circumstances. But one of the circumstances affecting this question they were told not to consider. For, although a speed of say six miles an hour may not, in the opinion of a jury, be unreasonable, if considered apart from a rule or direction of the company itself requiring a motorman whose car is approaching a crossing at that rate to reduce speed or shut off power, it is impossible to say that, if told that this rule or direction might be accepted as evidence of what the defendants deemed reasonable, the same jury might not find the maintenance of a rate of six miles an hour at a crossing, without reduction of speed and with power on, tending to increase rather than to diminish the speed, to be negligent conduct on the part of the motorman. In considering the question of speed at this point, the jury were in effect told to deal with it regardless of the rule for reduction of speed and the direction that power should be shut off. The instruction to the jury that they should pass upon the reasonableness of speed, therefore, did not, in my opinion, at all counteract the effect of the withdrawal from their consideration of the evidence as to the rules and directions of the company.

It seems impossible to say that this misdirection may not have had a serious effect upon the opinion of the jury, not merely upon the question of primary negligence, which may in the present case be unimportant, but also upon the question of ultimate negligence



on the part of the defendants: *Bray v. Ford*, [1896] A.C. 44. Misdirection being shewn, the party upholding the verdict must, notwithstanding Rule 785, shew that the misdirection did not affect the result: *Anthony v. Halstead* (1877), 37 L.T.N.S. 433. The jury might upon the evidence have found that, but for the motor-man's failure sooner to shut off power, or to reduce speed, the momentum of the car would have been so lessened that he could, with the emergency appliances at his command, have avoided running down the plaintiff; and they might also have found, if allowed to consider the rule as to reducing speed and control and the instruction as to shutting off power when approaching crossings, that such failure to shut off power and to reduce speed was negligence.

But would this be "ultimate" negligence, within the meaning of the rule holding a defendant liable, notwithstanding contributory negligence of the plaintiff, if in the result he (the defendant) could by the exercise of ordinary care have avoided the mischief? This question has been the subject of much keen discussion.

The rule in *Davies v. Mann* (1842), 10 M. & W. 546, as definitively stated in *Radley v. London and North Western R.W. Co.*, 1 App. Cas. 754, has been much criticized. It has been spoken of as destructive of the doctrine of contributory negligence, and as having introduced a principle of manifest injustice, and thrown the whole subject into confusion: *Thompson's Law of Negligence* (1901), sec. 230; but compare sec. 232, p. 222.

Mr. Beach in his work on *Contributory Negligence*, 3rd ed., pp. 36 *et seq.*, treats "ultimate" negligence of the defendant as inconsistent with contributory negligence of the plaintiff, maintaining that if the defendant's negligence be the "ultimate" negligence, it cannot be truly said that the plaintiff's negligence is a proximate cause of the mischief, and that, therefore, it is not really contributory negligence. This view is directly opposed to the specific proposition of Lord Penzance in *Radley v. London and North Western R.W. Co.*, and (notwithstanding any possible doubt which the recent judgments in *Reynolds v. Tilling* (1903), 19 Times L.R. 539, 20 Times L.R. 57, may suggest as to the scope and effect of the House of Lords decision), cannot be countenanced in our Courts. In *Reynolds v. Tilling*, Walton, J., thought that a finding of ultimate negligence, if made, might have been disregarded;

D. C.

1907

BRENNER

v.  
TORONTO  
R.W.Co.

Anglin, J.



D. C.

1907

BRENNER

v.

TORONTO

R.W.Co.

Anglin, J.

the report gives no reasons for the affirming judgment in the Court of Appeal, and it is not clear that the Lords Justices did not proceed upon the view that the undisputed facts of that case necessarily excluded a finding of "ultimate" negligence.

I have already said that the existence of "ultimate" negligence of the defendants is quite as compatible with contributory negligence of the plaintiff as is the latter with primary negligence of the defendants as a proximate cause.

It is elementary that in order to preclude recovery it is not necessary that the plaintiff's negligence should be the sole proximate cause of the injury; and it is equally clear that, if his negligence contribute in any degree as an operative and efficient cause, there can be no weighing of that negligence against the fault of the defendant. Where contributory negligence of the plaintiff is established, the defendant must escape liability unless "ultimate" negligence on his part is also established.

It is upon the question what constitutes such ultimate negligence, that text writers differ most widely. In their treatise on the Law of Negligence, 5th ed., pp. 99 *et seq.*, Messrs. Shearman and Redfield maintain that nothing except a new negligent act or omission of the defendant, subsequent to the negligent act or omission of the plaintiff, can amount to "ultimate" negligence on the part of the former. According to this view, the plaintiff, if guilty of contributory negligence, cannot succeed unless the mischief might have been avoided but for some new omission of the defendant to take ordinary care after he knew or should have known of the plaintiff's danger. Messrs. Clerk and Lindsell in their work on the Law of Torts, 4th ed., at pp. 502-5, discuss this question, and incline to the view that the rule as to "ultimate" negligence does not depend upon whether "the defendant's negligence was later in time than that of the plaintiff, for the negligence of the plaintiff in omitting to remove his person or property continued down to the moment of the accident just as much as did the defendant's omission to take care; it is simply that the latter being in motion was the one who actually did the damage. He is responsible who was the efficient cause." Thompson's view agrees with that of Messrs. Shearman and Redfield: Thompson on Negligence (1901), sec. 237.

Mr. Beven's ideas upon the doctrine of "ultimate" negligence

(Beven on Negligence, 2nd ed., pp. 156-7, 176) are somewhat obscure. While he recognizes the weight and authority of the Radley decision, his view seems to be that in order to establish contributory negligence the defendant must prove not only that negligence of the plaintiff was a proximate cause of the casualty, but also that the defendant could not by the exercise of ordinary care have avoided the consequences of such negligence. It would follow that where contributory negligence is properly found there can be no "ultimate" negligence of the defendant. This is singularly like Mr. Beach's view stated in another form, and does not give due force and effect to the judgment in the *Radley* case.

Mr. Smith, on the other hand, in his book on Negligence, 2nd ed., p. 232, says: "If the defendant's negligence is of such a character that he has deprived himself of his power of avoiding the plaintiff's negligence, that is equivalent to his being able to avoid it and negligently omitting to do so. . . . Suppose the defendant, sitting in his trap, negligently tied his reins to it, and fell asleep, and his horse started off; the plaintiff negligently was playing at pitch and toss in the street; the defendant, having awoke, could by ordinary care avoid running over the plaintiff, but he was too idle to untie the reins. The defendant is liable; but, could it be contended that he would be less liable if he had deprived himself of the power of exercising care in the first instance by letting the reins lie on the horse's back? Clearly he would be liable, although as a matter of fact he could not avoid the plaintiff's negligence, having put it out of his power to do so."

This view, though much criticized, receives distinct judicial support in the decision of the Irish Court of Exchequer in *Scott v. Dublin and Wicklow R.W. Co.* (1861), 11 Ir. C.L.R. 377, which is not, however, cited by Mr. Smith. Pigot, C.B., at pp. 394-5, says: "But it is contended that the instruction given to the jury ought to have been qualified by this, that the defendants were not liable unless, *by a new physical act*, they could have avoided the consequences of the want of care on the part of the plaintiff. I can find no warrant for such a qualification in any of the authorities which have been cited. If in *Davies v. Mann*, 10 M. & W. 546, the driver of the waggon, if in *Tuff v. Warman*, 5 C.B.N.S. 573, the crew of the steamer, had become, half an hour before the collision, so drunk that their arms were powerless, and if they were still in the

D. C.  
1907  
BRENNER  
v. F.  
TORONTO  
R. W. Co.  
Anglin, J.

D. C.  
1907  
BRENNER  
v.  
TORONTO  
R.W.Co.  
Anglin, J.

same state of drunkenness when the collision occurred, the defendants in each of those cases, according to the argument of the present defendants in support of this exception, must have been exempt from responsibility; because the driver in the one case, and the crew in the other, were so drunk as to be incapable of doing any physical act which could avoid the result of the plaintiff's want of care. Nay, more; if they had been only partially drunk, so as to have retained the voluntary use of their arms, the defendants would be liable; but if they were so thoroughly drunk as to have lost all muscular power, the defendants would be exempt from all responsibility, according to the rule of instruction for the jury suggested by the thirteenth exception." At p. 402 Fitzgerald, B., expresses the same view. Hughes, B., also concurred.

In *Springett v. Ball* (1865), 4 F. & F. 472, where the driver of an omnibus failed to see a person negligently crossing the street, because his attention was engrossed by his horses owing to the absence of a "skid" which he should have had, Cockburn, C.J., held that the owners of the omnibus would be liable if, but for the distraction due to the want of a skid, the driver could have seen the plaintiff in time to pull up. "He would be the cause of the accident, even although the plaintiff was in some degree careless in crossing as he did." The anterior negligence in failing to provide the skid, because it compelled the driver to devote his entire attention to his horses, amounted to "ultimate" negligence, inasmuch as it put it out of the driver's power to discharge his duty of avoiding the consequences of the plaintiff's negligence.

Sir Frederick Pollock in his work on the Law of Torts, 7th ed., says at p. 455: "It would seem that a person who has by his own act or default deprived himself of ordinary ability to avoid the consequences of another's negligence can be in no better position than if, having such ability, he had failed to avoid them; unless, indeed, the other has notice of his inability in time to use care appropriate to the emergency; in which case the failure to use that care is the decisive negligence." But in his illustrations Sir Frederick Pollock confines the application of this principle to the case of a plaintiff who by his own default has disabled himself from using ordinary care. That it must apply with equal force to a negligent defendant seems manifest. It is obvious, however, that not in every case in which there is self-created disability to

avoid consequences of another's negligence will the person so disabled be treated as if "having such ability he had failed to use it," for were this so the plaintiff must have failed in the celebrated case of the tethered donkey.

In the great majority of the cases in which the question of "ultimate" negligence has arisen, the act or omission relied upon as constituting such negligence has not unnaturally been subsequent in time to the plaintiff's act of contributory negligence. But it seems repugnant to common sense to exclude from the application of this wholesome rule all cases in which, although, after the danger of the plaintiff has become or should have been apparent, the defendant has done everything then in his power to avert the mischief, he failed to avoid it solely because of the continuing effect of some anterior negligence of his own. For instance, if, in the present case, the defendants' car had not been equipped with a brake or reversing machinery, the sending out of a car thus deficient would have been an act of negligence clearly preceding in point of time any negligence of the plaintiff. If, excluding all other negligence on the part of the defendants, it were clear that, upon the emergency arising owing to the plaintiff's want of care, the use of the lacking brake or reverse would have avoided the injury, should the defendants be heard to say that because the want of brake or reverse was due to an antecedent omission of duty on their part, the failure to avert the mischief would not amount to "ultimate" negligence? Can any tangible distinction be drawn between the case in which a car is wholly unequipped with such emergency appliances and the case in which that equipment is rendered inefficient and practically useless through some neglect of duty of the defendants?

Again, the duty of the defendants to the plaintiff, breach of which would constitute "ultimate" negligence, only arose when her danger was or should have been apparent. Prior to that moment there was an abstract obligation incumbent upon them to have their car equipped with efficient emergency appliances ready and in condition to meet the requirements of such an occasion. Had an occasion for the use of emergency appliances not arisen, failure to fulfil that obligation would have given rise to no cause of action. Upon the emergency arising, that abstract obligation became a concrete duty owing to the plaintiff to avoid the conse-

D. C.

1907

BRENNER

v.

TORONTO

R.W.Co.

Anglin, J.



D. C.  
1907  
BRENNER  
v.  
TORONTO  
R.W.Co.  
Anglin, J.

quences of her negligence by the exercise of ordinary care, breach of which would constitute actionable negligence. Up to that moment there was no such breach of duty to the plaintiff. In that sense the failure of the defendants to avoid the mischief, though the result of an antecedent want of care, was negligence which occurred, in the sense of becoming operative, immediately after the duty, in the breach of which it consisted, arose. It effectively intervened between the negligence of the plaintiff and the happening of the casualty.

Where, as here, both plaintiff and defendant are present at the time of the occurrence producing injury, the crucial question appears to be—which of them had, or, but for some disabling negligence of his own, would have had, the last opportunity to avoid the mischief. The duty of both plaintiff and defendant, each to avoid the consequences of negligence on the part of the other, is the same. Where negligence of the plaintiff is established, if, after the peril is imminent, both plaintiff and defendant might by the exercise of ordinary care avoid the casualty, the plaintiff cannot recover. If, without any fault of his own, neither could then avoid the catastrophe, again the plaintiff cannot recover; he is in the like plight, if he alone could, or, but for his own fault, might then have, prevented the mischief. But if, in like circumstances, the defendant alone could, or, but for his own default disabling him from so doing, might, have avoided the casualty, he should be held liable.

The distinction between causes described as “proximate,” “efficient,” or “decisive,” on the one hand, and causes spoken of as “merely inducing,” or “*sine quâ non*,” or “amounting rather to conditions,” on the other, is well established in jurisprudence. This distinction is applied as the test to determine the materiality of original negligence of a defendant and of contributory negligence of a plaintiff. The same or a like test, applied to negligence that renders abortive efforts, made after peril has become imminent, to avert disaster, would seem to afford a reliable criterion by which to determine whether such negligence is indeed that “ultimate” negligence—that last operative breach of duty—which justifies the assertion that the person guilty of it might in the result have avoided the consequences of the negligence that created the situation of peril.

I eliminate, as presenting no serious difficulty, cases in which the defendant has been guilty of a new physical act of negligence, whether of omission or commission, after the plaintiff's danger became obvious; and, for the same reason, cases in which, after peril was imminent, the plaintiff could by ordinary care have escaped injury. To avoid grappling with unnecessary though interesting problems, I also put aside cases in which either plaintiff or defendant is absent from the scene of the accident. I also exclude cases in which the mischief is an instantaneous result of the operation of the joint negligence of the defendant and the plaintiff; in such cases no question of ultimate negligence arises. This was probably the view taken of the facts in *Reynolds v. Tilling* in the English Court of Appeal, and, if so, the decision of that case is readily intelligible.

But there is a class of cases where a situation of imminent peril has been created, either by the joint negligence of both plaintiff and defendant, or, it may be, by that of the plaintiff alone, in which, after the danger is or should be apparent, there is a period of time, of some perceptible duration, during which both or either may endeavour to avert the impending catastrophe. The negligence that created the peril, though still operative in one sense, has, in another sense, spent itself, and ceased to operate. It has given place to efforts to escape its consequences. Such efforts, within the limits of ordinary care, it is the duty of both plaintiff and defendant to make. If, from no other cause than the nature of the situation itself, such efforts duly made prove unsuccessful, although the incapacity of the person making them may be said to be due to the negligence which created the situation of peril, that negligence at this stage bears to such incapacity rather the relation of a remote cause or cause *sine quâ non* than that of a proximate and efficient cause. But if, notwithstanding the difficulties of the situation, efforts to avoid injury duly made would have been successful, but for some self-created incapacity which rendered such efforts inefficacious, the negligence that produced such a state of disability is not merely part of the inducing causes—a remote cause or a cause merely *sine quâ non*—it is, in very truth, the efficient, the proximate, the decisive cause of the incapacity, and therefore of the mischief.

There is no English or Canadian authority, so far as I am aware,

D. C  
1907  
BRENNER  
".  
TORONTO  
R.W.Co.  
Anglin, J.

D. C.  
1907  
BRENNER  
v.  
TORONTO  
R. W. Co.  
Anglin, J.

which is inconsistent with the judgments of Pigot, C.B., and Fitzgerald, B., in the Irish Court of Exchequer (*Scott v. Dublin and Wicklow R.W. Co.*, 11 Ir. C.L.R. 377). The view there taken and so well expressed by Mr. Smith, and indorsed *sub modo* by Sir Frederick Pollock, appeals to me as logically sound. Moreover, to permit incapacity created by the default of the defendant himself to serve as an excuse for a failure to prevent injury to the plaintiff, which would be otherwise inexcusable, savours of injustice. Not without hesitation, because of the volume of American authority opposed to this view, and of the manifest difficulty which it may occasion in some cases in drawing a clear distinction between primary and ultimate negligence, I have reached the conclusion that negligence of a defendant incapacitating him from taking due care to avoid the consequences of the plaintiff's negligence, may, in some cases, though anterior in point of time to the plaintiff's negligence, constitute "ultimate" negligence, rendering the defendant liable notwithstanding a finding of contributory negligence of the plaintiff. Such anterior default of the defendant is, in my opinion, "ultimate" negligence, when it renders inefficient to avert injury to the plaintiff means employed by the defendant after danger became apparent, and which would otherwise have proved adequate to prevent the mischief, or renders the defendant wholly incapable of employing such means, though time was afforded for his using them efficaciously but for such disabling negligence.

In the present case it is clear upon his own story that after the plaintiff's danger became apparent to him, there was a period of time, short it may be, but distinctly perceptible, in which the motorman endeavoured to avoid running down the girl by lessening the momentum of his car. The situation in which the plaintiff found herself was apparently such that her efforts at self-preservation after the peril became imminent were futile because of the intrinsic difficulties of her position. It may be that the motorman's efforts were likewise unsuccessful solely because of the difficulty of the situation then developed. But, having regard to the facts that another moment of time would have enabled the unfortunate girl to have escaped; that the momentum of a car with power thrown off will be considerably reduced in running 127 feet or even 87 feet; that it was admitted by the motorman that power was not thrown off until the car was 87 feet west of the south-west corner of the Osgoode

Hall property; and that there was evidence upon which a jury, had it not been withdrawn from them, might have found that it was negligent not to have had the power off when the car was 40 feet to the east of that corner, or at least before it passed the corner—it seems impossible to say that, had this issue been presented for their consideration with all the evidence bearing upon it, and under a charge defining “ultimate” negligence, as outlined above, the jury might not have found that, notwithstanding her contributory negligence, the defendants might in the result by the exercise of ordinary care have avoided injury to the plaintiff. An important part of the evidence was unfortunately withdrawn, in my opinion improperly, from the consideration of the jury; and, though the learned Judge did not in terms direct the jury that ultimate negligence of the defendants must consist in some new physical act or omission of the motorman subsequent to the plaintiff’s danger becoming apparent, that is the purport and effect of all that he said upon this branch of the case.

For these reasons I regard the verdict and the judgment founded upon them as unsatisfactory, and I would set them aside and direct a new trial of this action. But, inasmuch as the attention of the learned Judge was not clearly directed by counsel to the bearing upon the question of ultimate negligence of the portion of his charge which is, in my opinion, unsatisfactory, and disregard of the rule as to reducing speed and the direction as to shutting off power when approaching crossings is not alleged as a ground of negligence upon the record (though evidence upon these matters was admitted without objection), costs of the former trial and of this appeal should be costs in the cause.

MULOCK, C.J.:—I agree.

CLUTE, J.:—I have read the very full and lucid judgment of my brother Anglin, where the facts and grounds of objection to the charge of the learned trial Judge are sufficiently set forth.

I agree, for the reasons therein stated, that there was a misdirection. The jury were in fact told, as the learned trial Judge himself states, “that the rules of the company had nothing to do with it.” The rules of the company I take to be the instructions, whether written or verbal, provided by the company to guide their motormen in running their cars.

D. C.

1907

BRENNER

v.

TORONTO

R.W.Co.

Anglin, J.



D. C.

1907

BRENNER

v.

TORONTO

R.W.Co.

Clute, J.

Whitehead, one of the defendants' witnesses, and appointed by them as instructor of motormen, says at pp. 220-1:—

"Q. Is not there a rule that you shut off the power on approaching a street? A. Yes, they are supposed at all cross-streets to shut off the power and ring the gong.

"Q. How far? A. A reasonable distance; it depends upon the speed you are travelling at.

"Q. You will have to let me know how far you consider a reasonable distance: 'When approaching crossings and crowded places where there is a probability of accidents, the speed must be reduced and the car got carefully under control.' That is rule 58: You impress that upon your motormen? A. Yes.

"Q. Then at what distance from the crossing do you consider that the man should shut off his power and begin ringing the gong? A. It depends upon the speed at which he is travelling.

"Q. Supposing he is travelling six miles an hour? A. He should shut off his power 60, 80, or 100 feet away from the street crossing.

"Q. And at ten miles? A. A little sooner."

Then at p. 223: "Q. If you had your power on full after leaving York street, where would you turn it off? A. I would shut it off 40 or 50 feet back from the corner of University street or whatever you call it."

This witness thinks that a car might be stopped by reversing, in 50 feet, and at p. 230 is asked:—

"Q. Do I understand there are instructions to motormen to stop at cross-streets? A. Decidedly no, only at intersections of other tracks.

"Q. You do not mean to say at all cross-streets? A. No, but a man naturally, as a precaution, shuts off the power when coming to a street; he is not supposed to stop unless it is necessary.

"Q. He has to shut the power off? A. Well, I do it at every cross-street as a precaution.

"Q. Coming to every cross-street you shut it off? A. I shut off my current.

"Q. For what purpose is that? A. Just as a precaution in case of anything happening, not that I am expecting anything, but we never know what is coming.

“Q. Would you do that when approaching a crossing at five or six miles an hour? A. Yes, decidedly.”

This precaution of shutting off the power in approaching a crossing is enjoined by the company, and may fairly go to the jury as the company's view of what would be reasonable and proper in approaching a crossing to avoid any danger.

Rules and directions are here prescribed, which, if disregarded, would be some evidence of negligence on the part of the motorman. The motorman in question swears he did not turn off the power until opposite the bicycle path, which would be about 127 feet west of the point where the power ought to have been turned off.

I have read and re-read the charge of the learned trial Judge bearing upon this point, and from it I think that the jury could not otherwise have interpreted the charge but to mean that it was of no consequence whether the rule and instructions, as above given, were disregarded or not. The charge in this regard is, in my judgment, a misdirection. But that, of course, is no ground for a new trial unless some substantial wrong or miscarriage has been thereby occasioned.

This piece of evidence, which was, in effect, withdrawn from the jury, had a direct bearing upon the question of the defendants' negligence, and one cannot say what might have been the finding had the charge in this regard been otherwise than it was. No doubt, a finding that the plaintiff could by the exercise of reasonable care have avoided the accident would have disintituled the plaintiff to succeed, even had the jury found the defendants guilty of negligence; and, as it was stated that the charge was without objection, in so far as it referred to the contributory negligence of the plaintiff, it would appear that the misdirection, if there be any, has not as to this finding resulted in any substantial wrong to the plaintiff. It could only be of importance if it has relation to that which enters into the consideration of the further and more difficult question, namely, could the defendants by the exercise of ordinary care and diligence have avoided the accident notwithstanding the negligence of the plaintiff? In other words, had it any bearing on the answer to the fifth question, namely, “If the plaintiff failed to exercise reasonable care, did the motorman fail to exercise reasonable care to avoid injury to her?” The jury have answered this question “no.” Unless, therefore, it can be shewn that the misdirection

D. C.

1907

BRENNER

v.

TORONTO  
R.W.Co.

Clute, J.

D. C.  
1907  
BRENNER  
v.  
TORONTO  
R.W.Co.  
Clute, J.

may have affected the minds of the jury in coming to a decision on this question, it is immaterial. There is evidence that the car went some distance beyond where it should have gone after the brakes were applied, if it had been under proper control.

If the jury were permitted to consider the evidence of the neglect of the motorman to turn off the power before reaching the crossing, it might have influenced their finding as to whether or not, notwithstanding the plaintiff's negligence, the motorman might have avoided the accident. The question then comes, if this default of the motorman may be considered in dealing with that question, then was there a misdirection which had a direct bearing upon the result? To put it in other words, may the default which occurred before the collision took place be regarded as a continuing negligence so as to be taken into consideration in deciding what the motorman ought to have done in the premises? Did he, in short, preclude himself from effectively operating the appliances at hand to stop the car? It seems reasonable that the jury should have the right to consider all conditions affecting the case in order to reach a proper judgment upon this point. If, as a matter of fact, the appliances may have been effective, but were not because of the defendants' prior negligence, which in its effect was still existing, then it is as if the defendants by their motorman neglected to do that which they might have done to have avoided the injury. It brings up the question which has been very fully treated by my brother Anglin, and I agree in the conclusion at which he has arrived. It presents itself to my mind in this way: suppose a motorman by reason of his prior intoxication had rendered himself unfit and incapable of applying the brakes effectively so as to avoid the accident, could it be doubted that the defendants might still be liable notwithstanding the plaintiff's negligence? Does it make any difference that his fault was, in not having the car under control so as to enable him to work the appliances with effect? I think not. Whether the prior default affected himself or that which he was to operate, could, it seems to me, make no difference. In either case he seeks to excuse himself by taking advantage of his own wrong. This he ought not to be permitted to do. If he says, I used all the appliances at hand but was unable to stop the car, the answer comes, you might have stopped the car if you had not yourself put the car in the condition which prevented you from

doing so; and any evidence which would support that view ought to be left to the jury.

Now, it cannot be doubted, I think, that if he had turned off the power before reaching the crossing, the car would have had less momentum; the appliances for stopping the car might have worked effectively, and the plaintiff might have received the extra time necessary to enable her to escape. This is the evidence which, by the misdirection, in my humble opinion, was in effect withdrawn from the jury. It seems impossible to say, therefore, that there was not a substantial wrong or miscarriage occasioned by the misdirection; it is sufficient that the result might have been different. The full evidence bearing upon this vital point—and as it turns out the only point in question—the jury were not permitted to pronounce upon; at least they were told that it was a matter of no importance. I think this view does not introduce any new principle. None of the authorities, as far as I have been able to find, goes so far as to say that there may not be a continuing negligence. They are very fully dealt with in *Scott v. Dublin and Wicklow R.W. Co.*, 11 Ir. C.L.R. 377, quoting with approval the rule as laid down in *Tuff v. Warman*, 5 C.B.N.S. at p. 584, and which is not in conflict with *Davies v. Mann* or the *Radley* case. As put by Mr. Smith in the 2nd edition of his work on Negligence, at p. 232: "If the defendants' negligence is of such a character that he has deprived himself of his power of avoiding the plaintiff's negligence, that is equivalent to his being able to avoid it and negligently omitting to do so."

The general rule of law in cases of this kind, as laid down by the House of Lords in *Radley v. London and North Western R.W. Co.*, 1 App. Cas. at p. 759, is as follows: "The first proposition is a general one, to this effect, that the plaintiff in an action for negligence cannot succeed if it is found by the jury that he has himself been guilty of any negligence or want of ordinary care which contributed to cause the accident. But there is another proposition equally well established, and it is a qualification upon the first, namely, that though the plaintiff may have been guilty of negligence, and although that negligence may in fact have contributed to the accident, yet if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him."

D. C.

1907

BRENNER

v.

TORONTO  
R. W. Co.

Clute, J.



D. C.

1907

BRENNER

v.

TORONTO

R. W. Co.

Clute, J.

In reference to the last proposition it was strongly urged by Mr. Nesbitt that what may be called ultimate negligence must be subsequent in point of time to the contributory negligence of the plaintiff; that the defendants were not liable *unless by some new physical act subsequent in point of time* they might have avoided the want of care on the part of the plaintiff. This is to engraft a qualification on the rule as laid down by the House of Lords, and I find no authority for its warrant. Such a qualification would, in my opinion, curtail the usefulness of the rule, and without any just reason for so doing that I can find.

If a defendant has by his own prior wrongful act done that which necessarily precludes him from doing what is his manifest duty to do, he ought not to be permitted to avail himself of such default as an answer to his neglect; and this, I think, is especially so where, as in the present case, the instrument of danger is a railway car, which admittedly requires constant caution and care in its management.

I think that the evidence with reference to the turning off of the power before reaching the crossing was relevant to the issue of ultimate negligence. I do not see how a jury could properly deal with that question without giving whatever weight was due to that evidence as a part of the case, and that was practically excluded by the learned trial Judge; the plaintiff was prejudiced in the trial of her action; the result was possibly affected and there ought, in my judgment, to be a new trial. Costs of the former trial and of this appeal to be costs in the cause.

E. B. B.

[IN THE COURT OF APPEAL.]

RE SINCLAIR AND TOWN OF OWEN SOUND.

C. A.

1906

Dec. 28.

*Municipal Corporations—Local Option By-law—Voting on by Electors—Town Divided into Wards—Municipal Act, sec. 355—Objections to By-law.*

A by-law enacted under the local option provisions of the Liquor License Act, R.S.O. 1897, ch. 245, to prohibit the sale by retail of spirituous liquors within the municipality, was submitted for the approval of the electors of the municipality, as provided by sec. 141 of the Act, and was approved by a majority of 476. The municipality being a town divided into wards, it was objected that persons who were ratepayers in respect of property situate in different wards were not permitted to vote more than once on the by-law:—

*Held*, upon a consideration of the provisions of secs. 338 to 375, inclusive, of the Municipal Act of 1903, which are those referred to in sec. 141 of the Liquor License Act as prescribing the manner in which the vote is to be taken, that sec. 355 of the Municipal Act does not apply to such a by-law; and the objection mentioned and other objections to the by-law were overruled, MEREDITH, J.A., dissenting.

Decision of a Divisional Court, 12 O.L.R. 488, affirmed.

THIS was an appeal by William Henry Sinclair, the applicant in the Court below, from the order of a Divisional Court reversing an order of Mabee, J., quashing by-law No. 1172 passed by the council of the town on the 15th January, 1906. The opinions of Mabee, J., and of the Divisional Court are reported 12 O.L.R. 488, and the facts are there stated.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, J.J.A., on the 29th and 30th November, 1906.

Wallace Nesbitt, K.C., James Haverson, K.C., and W. H. Wright, for the appellant.

F. E. Hodgins, K.C., and J. W. Frost, for the respondents.

The arguments are referred to in the opinions printed below, and the cases cited are all mentioned in the report of the proceedings in the Court below.

December 28. MOSS, C.J.O.:—The by-law was enacted under the local option provisions of R.S.O. 1897, ch. 245, known as the Liquor License Act, to prohibit the sale by retail of spirituous liquors within the municipality; and on the 1st January, 1906, before it was finally passed by the council, it was submitted for

C. A.

1906

RE

SINCLAIR  
ANDTOWN OF  
OWEN  
SOUND.

MOSS, C.J.O.

the approval of the electors of the municipality, as provided by sec. 141 of the Act.

The result of the polling as declared shewed a majority of 476 in favour of the by-law.

A number of objections were taken on the motion to quash, but the main one was that persons who were ratepayers in respect of property situate in different wards were not permitted to vote more than once on the by-law.

Effect was given to this objection by Mabee, J., but the Divisional Court were of the contrary opinion.

After carefully considering the grounds upon which the appeal was supported in argument, I find myself unable to adopt them.

The provisions of the Municipal Act, 1903, to which we are referred by sec. 141 of the Liquor License Act, are those comprised in secs. 338 to 375, inclusive, so far as the same are applicable.

If these sections only dealt with one species of by-law, a certain degree of support would be lent to the appellant's contention. But it is plain that there is a broad distinction made between expressing an opinion or voting on a by-law for contracting a debt and on other by-laws requiring the assent of the electors. Sections 338 to 352, inclusive, may be said to apply generally to all voting for the purpose of ascertaining the opinion of the electors on a by-law requiring their assent. By the incorporation of secs. 138 to 206, inclusive, a code of procedure is created for submitting the by-law to the electors, including the proceedings at the poll and for and incidental to the same and for the purposes thereof: sec. 351.

Looking at all these provisions, there is nowhere to be found any provision expressly enabling any elector to vote more than once except in the specified cases of aldermen or councillors where in cities or towns the aldermen or councillors are elected for the wards, in which case every elector rated in any ward for the necessary qualification may vote once in each ward for each alderman or councillor to be elected for the ward: sec. 158 (3).

And, throughout, the general common law rule of one vote where a poll is demanded is taken for granted. The very term "poll" implies the singular, for the poll is the numbering the polls of the electors who may tender their votes, taking their votes individually, and separating them from those who have no votes:

see Heywood's County Elections, p. 354. And at common law a freeholder could not poll twice at the same election for Knights of the Shire: see p. 425 *et seq.*

The appellant, however, places special reliance on sec. 355.

Sections 353 and 354 deal only with one class of by-law to be voted on, namely, that for contracting a debt. They deal with the qualification required in order to entitle a person to vote, and they provide that he or she must be a ratepayer (not an elector as in the preceding sections) and a freeholder or a leaseholder for a term extending for the period of time within which the debt to be contracted or the money to be raised by the by-law is made payable, who has covenanted in his lease to pay all municipal taxes in respect of the property leased.

Sections 356 and 357 also deal with by-laws for contracting debts, and it is significant that in all these sections ratepayers are spoken of. The distinction between by-laws to be voted on by electors and by-laws to be voted on by ratepayers is further emphasized by sec. 365, which prevents the clerk of the municipality from giving a casting vote. The language used is: "Where the assent of the electors, *or of the ratepayers* or of a proportion of them, is necessary to the validity of a by-law . . ." The Legislature has thus shewn that it had in mind the two classes of by-law, viz., those to be voted on by electors generally and those to be voted on by ratepayers, a more limited class.

Turning then to sec. 355, we find that it speaks of ratepayers, and deals with their rights of voting. It is clearly not intended to regulate voting generally. If it were not in the Act, its absence would not prevent any elector from voting on a by-law. It says that certain electors, *i.e.*, ratepayers, may under certain circumstances vote in more than one ward, and the question is whether that privilege is general or confined to a special class of by-law. The language, read, as it should be, in the light of the context, shews that the ratepayer spoken of there is the ratepayer referred to in the two preceding sections, and the case dealt with is that of voting on a by-law for contracting a debt, while its grouping with the sections immediately preceding and following shew that it was the intention to confine it to that case. So confining it does not interfere with the right of other electors to exercise their franchise in the manner and according to the other provisions

C. A.

1906

RE  
SINCLAIR  
AND  
TOWN OF  
OWEN  
SOUND.

MOSS, C.J.O.



C. A.

1906

RE

SINCLAIR  
ANDTOWN OF  
OWEN  
SOUND.

MOSS, C.J.O.

of the Act in every case in respect of which they possess the necessary qualification. The section extends to one class of electors a special privilege to be exercised in a special case. The words "shall be so entitled to vote" indicate a voting under some particular or special circumstances. And these are ascertained by reference to the two preceding sections, which define the ratepayers who are entitled to vote on a by-law for contracting a debt. And I think that the fair interpretation to be put upon sec. 355 is that each ratepayer, as defined in the preceding sections, is to be entitled to vote, in respect of a by-law for contracting a debt as mentioned in the same sections, in each ward in which he has the qualification necessary to entitle him to vote on the by-law.

In this section we have the only other instance in which the right to vote more than once on any subject is expressly given by the Municipal Act. There are other instances in which, perhaps, the right may be given by implication by a provision enacting that a by-law is to be assented to by the electors in manner provided for in respect of by-laws for creating debts—or declaring that the persons entitled to vote thereon shall be the electors qualified to vote on by-laws for the creation of debts, *e.g.*, secs. 19 (1), 28, and 565 (3).

When there are found instances where the right is expressly conferred, why should we infer an intention to recognize a similar right in all cases? Ought we not rather to infer that the general intent is against any such right, and that it exists only in the instances in which the Legislature has said in terms that it may be exercised?

Stress was laid in argument on the language of sec. 348 as indicating an intention to give to all persons whose names are found in the voters' list to be supplied to the deputy returning officers of each ward or polling subdivision a right to vote on any by-law. This would appear to involve declaring that the intention was to give all named in the list a right to vote on a by-law for contracting a debt, as well as on other by-laws, a conclusion quite opposed to the whole policy governing voting on a by-law for contracting a debt.

All the necessary directions as to voters' lists, poll books, etc., appear to be contained in secs. 148 to 154, inclusive, which are amongst those made to apply so far as applicable

to voting on a by-law. And unless, notwithstanding the recent change in its language, sec. 348 is still to be treated as applying only to voting on a by-law for contracting a debt, it appears to be superfluous. As it was before the change, it clearly applied only to such a by-law, and I do not think that, even now, we are driven to say that it is to be extended further. The direction to the clerk to supply a voters' list containing the names of all the persons appearing by the last revised assessment roll to be entitled to vote in the ward or polling subdivision, does not necessarily involve a declaration that the deputy returning officer in each ward or polling subdivision must accept their votes upon all questions to be voted on, no matter what the subject may be.

In the view I take of the legislation, it is not necessary to refer to the historical aspect of it, but I think an examination of the previous legislation will shew that during the whole period, except possibly between the date of the coming into force of the R.S.O. 1897, ch. 223, and the passing of the Municipal Act, of 1903, there was no general legislation enlarging the ordinary common law manner of signifying an assent or dissent, viz., by shew of hands if there is an open meeting, and by recording one vote when there is a poll, and the rule prevails unless there is some enactment or regulation providing otherwise. And as regards the period above mentioned, the Legislature by the amendment of 1903 brought the rule back to where it was before the revision.

The fact that in the recent enactment 6 Edw. VII. ch. 34, sec. 2, the Legislature made a special provision, can scarcely be taken as an affirmation that the general rule was otherwise. It may well be deemed an affirmance of the general principle made *ex majore cautela* in the particular case.

In my opinion, the Divisional Court came to the proper conclusion.

As to the other objections, the most formidable as presented in argument was the action of the clerk in inserting in the notice of the election a warning against voting more than once on the by-law. This is now answered by shewing that his view of the law was correct, and that, however unnecessary or outside the scope of his duty, the giving of the warning could not and in fact did not prevent any elector from giving one vote.

With regard to the other objections, I agree with the Divisional

C. A.  
1906

RE  
SINCLAIR  
AND  
TOWN OF  
OWEN  
SOUND.

Moss, C.J.O.

C. A.

1906

RE  
SINCLAIR  
AND  
TOWN OF  
OWEN  
SOUND.

MOSS, C.J.O.

Court that an inspection of the respective ballot papers for voting on this and another by-law shews that there is nothing in the objection based on a supposed confusion by reason of the colours of the papers, and that as respects the remaining objections they are not sufficiently made out in some cases, and the remaining cases are not such as to affect the validity of the by-law.

The appeal should be dismissed.

OSLER, J.A.:—This case presents another illustration of the difficulty caused by the loose way in which voting on by-laws by electors has been provided for. The Liquor License Act refers the matter—in the case of the local option by-law—to the Municipal Act, and when we turn to that Act we find by sec. 351 that “the proceedings at the polls and for and incidental to the same and the purposes thereof shall be the same as nearly as may be as at municipal elections and all the provisions of sections 138 to 206 inclusive except section 179 (casting vote of the clerk) so far as the same are applicable and except so far as is herein otherwise provided shall apply to the taking of the votes at the poll and to all matters incidental thereto.” A string of sections is thus introduced, many of which have no more to do with voting on by-laws than with horse-racing, while others can only be pressed into service by distorting their language to an extent which seems to me unwarrantable. These sections I pass over for the present, in order to deal with sec. 355, upon which the opponents of the by-law chiefly relied as establishing their contention that a large class of voters had been disfranchised by the refusal to permit them to vote in more than one ward. Upon the fullest consideration I have been able to give to the subject, I am of opinion that this section does not apply to the voting upon a local option by-law or to any by-law except a by-law for contracting a debt. This result flows from the language of the section itself, and the situation in which it is found. It is in the midst of a group of sections, 353-358, which relate exclusively to by-laws for contracting debts and to the class of voters, viz., ratepayers, as distinguished from the general body of voters or electors—*cf.* secs. 19 (1) (a), 71 a (6)—who alone are entitled to vote on such by-laws. Then, the qualification which entitles such ratepayers—being freeholders or leaseholders—to vote thereon having been provided for, sec. 355 enacts that where a



municipality is divided into wards, each ratepayer shall be so *entitled to vote* in each ward in which he has the qualification necessary to entitle him to vote on the by-law.' Throughout this group of sections there is a constant reference to the "ratepayer entitled to vote," and when sec. 355, repeating the words used half a dozen times in the two sections immediately preceding it, speaks of the "ratepayer so entitled to vote," it is difficult, for me at least, to resist the conclusion that the reference is to the ratepayer mentioned in those sections who is entitled to vote on a by-law for contracting a debt. The history of the previous legislation, which is confused and uncertain to a degree, does not help us much in determining the proper construction of the section as it stands, which is now, I think, moderately plain, and which, by limiting its application to the voting on by-laws for contracting debts, and so giving the voter a voice in each ward in which he has property to be affected, has the additional advantage of being consistent with reason.

In order, therefore, to discover whether an elector can vote in more than one ward on such a by-law as that now in question, we are thrown back upon the earlier group of sections, 138 to 206 inclusive (less 179), which, by sec. 351, are to apply to the taking of votes at the poll and to matters incidental thereto "so far as the same are applicable." I agree that clear authority must be found for giving the elector more than one voice in expressing his opinion at the polls. In the nature of things all that is necessary and sufficient is that he should do so once. What is required is that the by-law shall (if it is to carry) be approved by the electors, and, except where the question of taxing property is directly involved, as in the case of a by-law for contracting a debt, why should an elector have a double or treble vote, approving or disapproving two or three times of a by-law which affects every member of the municipality in the same way as himself, simply because he happens to be assessed for property in several wards? None of the sections I am now referring to in the Municipal Act of 1903 confers such a right, though, as the law stood in the R.S.O. 1887, ch. 184, sec. 137, and in the R.S.O. 1897, ch. 223, sec. 158, it probably did so, enacting as it did that "in towns and cities every elector may vote in each ward in which he has been rated for the necessary property qualification." The latter part of the section went on to limit the

C. A.

1906

RE  
SINCLAIR  
AND  
TOWN OF  
OWEN  
SOUND.

Osler, J.A.



C. A.  
1906  
RE  
SINCLAIR  
AND  
TOWN<sup>1</sup> OF  
OWEN  
SOUND.  
Osler, J.A.

right in the case of voting for mayors in cities and towns and reeves and deputy reeves in towns, but there would have been no difficulty in applying the general enactment in the first branch of the section to the case of voting upon any by-law. The frame of the section was, however, completely altered by the Acts of 1903, 3 Edw. VII. ch. 18, sec. 26, and ch. 19, sec. 158. The general words are gone, and the section is so entirely confined to the special cases of voting for mayor and aldermen, that by no straining of its language can it be read so as to apply to the voting upon a by-law, which now seems to rest, except in the special case of by-laws for contracting a debt, simply upon sec. 350. "At the day and hour fixed the poll shall be held and the vote shall be taken by ballot." So far, indeed, as any inference can be drawn from the terms of the new sec. 158, it shews the opinion of the Legislature to be opposed to plural voting.

Stress was laid by the appellant upon sec. 348, which enacts that, in the case of municipalities which are divided into "wards or polling subdivisions," the clerk is to prepare and deliver to the deputy returning officer for every ward or polling subdivision a list of all persons appearing by the then last revised assessment roll to be entitled to vote in that ward or polling subdivision, but, in the absence of any express enactment conferring the right to vote in every ward in respect of all by-laws requiring the assent of the electors, the section relates plainly enough to that single case in which persons are so entitled, the case, namely, of by-laws for contracting a debt under secs. 353-354. The reference to those sections in sec. 348, as it stood in R.S.O. 1897, ch. 223, was properly struck out by 3 Edw. VII. ch. 18, sec. 73, as superfluous and unnecessary, when by secs. 75 and 76 of the same Act secs. 353 and 354 were amended and confined to the case of a by-law for contracting a debt, the only by-law upon which, as I construe sec. 355, plural voting may become allowable.

I am of opinion that none of the other objections which have been suggested against the validity of the by-law in question, are substantial, and therefore, upon the whole, that the judgment below should be affirmed and the appeal dismissed.

GARROW, J.A.:—Section 141 of the Liquor License Act, R.S.O. 1897, ch. 245, provides that the council . . . may pass by-laws

for prohibiting the sale of intoxicating liquor, "provided that the by-law before the final passing thereof *has been duly approved* of by the electors of the municipality *in the manner* provided by the sections in that behalf of the Municipal Act." The necessary qualification fixed by that statute is simply that one proposing to approve or disapprove shall be an elector, that is, an elector entitled to vote at municipal elections: see *In re Croft and Town of Peterborough* (1890), 17 A.R. 21. For the qualification of a municipal elector see secs. 86, 87, 89, of the Consolidated Municipal Act, 1903. From these sections it will be seen that the franchise is very wide, embracing men and unmarried women, resident and non-resident freeholders, resident tenants, earners of income of not less than \$400, and farmers' sons. The *manner* of expressing approval or disapproval is set out in the Consolidated Municipal Act, 1903, from secs. 338 to 374. Provision is there apparently made for two classes of electors: first, the general electors, who may vote upon all by-laws requiring the assent of the electors which do not create a debt; and second, those who being electors have also in addition the necessary property qualification required by the statute to vote upon by-laws for contracting a debt. The special qualification required in the latter case is set forth in secs. 353 to 357, and is confined to freeholders, and to tenants who have covenanted to pay the municipal tax, provided also that the lease extends for the period of time within which the debt to be contracted is made payable.

Section 338 and following sections set forth the proceedings to be taken in the case of a by-law requiring the assent of the electors. And sec. 351 introduces generally the provisions applicable to municipal elections as the mode of obtaining the desired assent or dissent.

Then follow the special provisions before referred to in the case of electors entitled to vote upon by-laws for contracting a debt, who throughout these provisions are called not "electors" but "ratepayers." And sec. 355, the real bone of contention, provides that each "ratepayer" may vote in each ward in which he has the necessary qualification.

The town of Owen Sound is divided into three wards, and I agree that such wards were not abolished by the by-law providing for a general vote, and not by wards, for members of the municipal

C. A.

1906

RE  
SINCLAIR  
AND  
TOWN OF  
OWEN  
SOUND.

Garrow, J.A.

C. A.

1906

RE

SINCLAIR  
ANDTOWN OF  
OWEN  
SOUND.

Garrow, J.A.

council—with the result that the 257 voters having votes in more than one ward could lawfully vote in each ward in which they are otherwise qualified if this was a by-law for contracting a debt. But it is not. It is merely a question of the electors to whom by the Liquor License Act the matter has been referred by the Legislature saying by ballot “yes” or “no” to the proposal of the council.

There is surely no *à priori* reason why, having said the one or the other once, he should be permitted to continue saying it two or three times; or why he should have the opportunity to say “yes” in one ward and “no” in the next, as he might if he can lawfully vote in each ward. What is required, I assume (for it is not expressly stated), is the expressed will or opinion of the majority of the electors. And that can only be secured by giving to each the equal opportunity to speak once and no more.

But, of course, if the statute has said that any one or any class shall have a special voting power or privilege, I am bound, as every one is, to respect the statute, and to give full effect to its provisions.

No one claims, I think, that the right to vote more than once, except in the case of a by-law for contracting a debt, is expressly conferred in clear and unmistakable terms.

The main strength of the argument for the appellant rests upon the contention that sec. 355 must be construed as applicable not merely to by-laws respecting debts, but also to all by-laws requiring the assent of the electors. And I agree with the judgment of the Divisional Court in thinking that that proposition cannot be maintained.

The first thing to observe is, that all the machinery for obtaining the opinion of the ordinary elector on a by-law, other than one for contracting a debt, is completely supplied at the close of sec. 352. Then in sec. 353 by-laws for contracting debts are for the first time mentioned. And, as before pointed out, that section and sec. 354 prescribe the special qualification in addition to being an elector required in the case of such by-laws, while secs. 356 and 357 prescribe the special oaths to be taken by that class of electors. We have thus two sections immediately preceding and two immediately following sec. 355, clearly applicable only to the case of by-laws to contract debts. And in sec. 355, the word “ratepayer” as dis-

tinguished from "elector" is used, as is also the case in all the group of sections relating to this class of by-laws. Section 354, the next preceding section, starts off "every ratepayer shall be entitled to vote," etc. Similar language is used in sec. 353. And sec. 355 says ". . . each *ratepayer* shall be so entitled to vote in each ward in which he has the qualification necessary to entitle him to vote on the by-law." The only qualification required from the ordinary elector is that his name shall appear on the voters' list. And he need not even be a ratepayer: for instance, a farmer's son. "Ratepayer" and "elector" are not equivalent terms, and the use of the former word seems to me to clearly limit the section to the class for whose qualification and mode of voting, oaths, etc., the surrounding sections were provided. And the use of the words "so entitled to vote," read in conjunction with the words which I have just quoted from the next preceding section, seems to me to put the matter beyond question. To so construe the section is to give full effect to every word in it, while to read it as we are asked to do by the appellant would be to substitute for the word "ratepayer" the word "elector," and to treat as wholly superfluous the little but important word "so" in the second line, an entirely erroneous construction in my opinion.

And this result is reached by taking the statute just as it is, without reference to its history or to its amendments from time to time. But, if these are looked at, and it is, I think, quite legitimate on a question of doubtful construction to do so, the conclusion I have stated is, I think, strengthened rather than the reverse. The history of the section is stated in the opinion of the learned Chief Justice of the Exchequer Division. And the original intention to confine its effect to the case of by-laws to create debts, is, as he points out, clear. Then came the revision of the statutes in 1897, and had the matter stood as it is expressed in the R.S.O. 1897, ch. 223, sec. 348 and following sections, the appellant's case would have been much stronger. But the Legislature in their next effort, 3 Edw. VII. ch. 18, made it clear either that the consolidation in 1897 was erroneous, or that it did not express the legitimate intent in 1903, with the result that a number of small but important amendments were made, each of them tending to restore that which was the apparent intention in 1892. And the Act as so amended was consolidated in ch. 19 of the same year, and is now

C. A.

1906

RE  
SINCLAIR  
AND  
TOWN OF  
OWEN  
SOUND.

Garrow, J.A.



C. A.

1906

RE  
SINCLAIR  
AND  
TOWN OF  
OWEN  
SOUND.

Garrow, J.A.

the law. It is perhaps a pity that when they were at it they did not restore the original "such ratepayers" and "such by-law" in the section in question, but the continuance of the word "each" instead of "such" is not, under the circumstances, sufficiently decisive to base upon that the very important right to vote more than once upon every by-law requiring the assent of a majority of the electors.

At one time practically the only by-laws requiring the assent of the electors were those for contracting a debt, but now the electors must be consulted upon several matters, such, for instance, as granting a bonus, whether such grant creates a debt or not: 3 Edw. VII. ch. 19, sec. 591, sub-sec. 6 (a), sub-sec. 8 (a), sub-sec. 12 (a); reducing the number of aldermen in a city ward: sec. 70; reducing the number of councillors in a town: sec. 71; by-laws for the creation of wards, and for general voting instead of by wards: sec. 71 (a); and possibly other instances, for I have not thought it necessary to make an exhaustive search. And under sec. 42 of the Liquor License Act the assent of the electors is required to a by-law to increase the license fee.

If the appellant's contention prevailed, sec. 355 would apply to these as well as to the case in hand, with the result that in every instance the actual majority of the electors might be controlled and overcome by the greater voting power of a minority fortunate enough to have property in more than one ward, of no matter how small an amount so long as it was sufficient to meet the trifling qualification required to place their names upon the assessment roll and thence upon the voters' lists in the various wards.

It is, I think, safe to assume that that was not the legislative intention, and to make it so would, in my opinion, require explicit language.

It is not, I think, necessary to consider fully and separately each of the several grounds upon which the appellant's case was rested. I have dealt with the main contention at perhaps unnecessary length, for after all I have, as seems inevitable, simply elaborated somewhat the opinion expressed by the learned Chief Justice of the Exchequer Division, in which I fully concur. But perhaps a word or two may be permitted as to the effect of secs. 152 and 348, which provide for the list of voters being supplied to deputy returning officers in municipalities divided into wards. If I enter-

tained any doubt about the proper construction of sec. 355, my view would certainly be affected favourably to the appellant's contention by the language of sec. 348. But with sec. 355 entirely out of the way, which, as I have indicated, is, in my opinion, the proper construction, sec. 348, alone or in conjunction with 152, could not possibly confer a right to vote more than once, simply because the elector's name appears upon the roll in more than one ward. He can only vote once for mayor, reeve, or deputy reeve, and only once for each councillor or alderman, although he may, of course, vote in each ward for the latter. But, after all, he only casts one vote for one subject matter. That, it may even be said, is the universal rule both in Parliamentary and municipal elections, with the simple exception of by-laws for contracting debts. Voters' lists for each ward must be supplied for the benefit of the less fortunate but more numerous voter who only has property in one ward, and no provision is apparently made for eliminating the voter who is upon the roll in more than one ward. He must, however, discriminate for himself, and if he votes more often than he is in law entitled to, he is subject to the penalty imposed by sec. 162. And upon a scrutiny under sec. 369 and following sections evidence could be taken and an improper vote struck off.

The appeal should be dismissed with costs.

MACLAREN, J.A., concurred.

MEREDITH, J.A.:—I decline to follow the learned counsel, on either side, in their very minute analysis of many of the provisions of present and past Municipal Acts, or in their deep scrutiny into the origin and "history" of such provisions. However interesting such studies may be, they are not very helpful, indeed they might prove harmful, in solving the simple questions involved in this case. The Municipal Act is not a thing of purely scientific construction; it resembles more the settler's home, a small cabin to begin with, added to from time to time, as additions to the family and other circumstances required, until it has become a large and commodious enough dwelling place, but by no means an unalterable thing of purely architectural beauty; indeed, plainly shewing many more or less hasty patches, the work of a 'prentice hand rather than that of a master-builder. Nor are we to treat the present "consolidated" enactment as if it were a mere revision of statutes

C. A.

1906

RE  
SINCLAIR  
AND  
TOWN OF  
OWEN  
SOUND.

Garrow, J.A.

C. A.

1906

RE

SINCLAIR  
ANDTOWN OF  
OWEN  
SOUND.

Meredith, J. A.

as to which the Legislature had said that it should not be held to operate as new law; it is entirely the work of the Legislature; and that it was intended to be in many respects new law is apparent in the light of the next preceding Act, in which between one and two hundred changes in the law as it formerly was, are made. Nor are we to treat its provisions as cryptographical, else we meet with the experience of the antiquarians of famous fiction over the inscription "Bill Stubbs, his X mark," if I may be permitted distantly to follow the lead of Mr. Haverson in his always amusing and frequent humorous references. The Act is rather to be treated as one, generally speaking, written by plain persons in plain words for the guidance of plain men. It is to be remembered that many of its provisions—including those in question—are to be something in the nature of a *vade mecum* for municipal officers of all ranks, sorts, and conditions; not alone for those of great counties and cities, but also for those of every township, town, and incorporated village, few of whom have the necessary legal attainments even to follow the arguments of the learned counsel in this case, but who are expected with a modicum of sound sense to understand, and give effect to, their meaning; and if we approach this matter exercising no more than the same equipment, I have little doubt that the true meaning of the Legislature will be grasped without any very great effort.

The main question, in this case, is whether ratepayers duly and sufficiently rated in more than one ward, and whose names so appear, in each ward, upon the voters' list, prepared under and pursuant to the provisions of sec. 348 of the Consolidated Municipal Act, 1903, can lawfully vote in more than one of such wards upon a by-law submitted for the approval of the electors under the provisions of sec. 141 of the Liquor License Act.

The latter enactment provides, in plain words, that the council of any township, city, town, or incorporated village, may pass by-laws prohibiting the sale of spirituous liquors, except by wholesale, provided that the by-law is first approved of by the electors of the municipality in the manner provided by the sections in that behalf of the Municipal Act.

This enactment, though forming part of the Liquor License Act, would have just the same effect if, instead, it had been made part of the Consolidated Municipal Act, 1903. The matter is one over

which the license commissioners have no sort of power; but is purely one for the municipal council; a power to be exercised by the council in the best interests of the municipality.

To approach this main question from the standpoint of a present-day parliamentary election would be misleading; and that is an error into which, I suspect, some have already fallen. The single vote, or, as it is often called, "one man one vote," system or principle, has never been wholly applied to municipal elections; on the contrary, for obvious reasons, a right to vote in each ward, where sufficiently rated, has generally existed, and still exists, to some extent; and when it has been intended that it shall not exist, the Legislature has said so in plain and unmistakable language; see, for the latest instance, 6 Edw. VII. ch. 34, sec. 2 (2) (O.): "but no person shall vote more than once upon the said petition." And there never was, so far as I am aware, any sort of common law rule against more than one vote in such a case as this. We must not, therefore, approach this question as if there were any sort of a general prohibition of voting more than once.

It is important to bear in mind, in the first place, that that which the Legislature has authorized is the passing of a municipal by-law, and that the approval of the electors must be obtained "in the manner provided by the sections in that behalf of the Municipal Act." Without these latter words, the approval would needs be obtained in that manner; it is a by-law which is to be approved of, it is not the election of a mayor or alderman, so that it would follow that the mode of obtaining such approval of a by-law, not the mode of electing an officer, should be followed; those words, however, emphasize the fact and put it beyond controversy.

Then, in the next place, on turning to the Municipal Act it is found that there is a separate and distinct part of that enactment providing for the authentication of, and voting on, by-laws, and another relating to the election of members of municipal councils. The former is contained in Part VI., "Title II. Respecting By-Laws;" "Division III." of which is intituled "Voting on by Electors," and comprises secs. 338 to 374, the sections of the Act very properly indicated in the margin of sec. 141 of the Liquor License Act as those sections of the Municipal Act referred to in it.

Some point was attempted to be made of the fact that the word

C. A.

1906

RE  
SINCLAIR  
AND  
TOWN OF  
OWEN  
SOUND.

Meredith, J.A.



C. A

1906

RE

SINCLAIR

AND

TOWN OF

OWEN

SOUND.

Meredith, J. A.

"electors" is used in sec. 141, as indicating that the approval to be obtained was that of electors voting for members of the council, not voters voting upon a by-law. But, as before mentioned, the section expressly puts it beyond controversy that the approval shall be as of a by-law, not as of an election; and perhaps the word "electors" is at least as appropriate as "ratepayers," another word sometimes used, in the Municipal Act, in the same connection, for there may be many ratepayers who are not voters—disqualified ratepayers, corporations, etc.; and, besides all this, the Legislature has expressly declared in the Municipal Act that the word "electors" shall mean, among other things, persons entitled to vote in respect of any by-law; and by virtue of the Interpretation Act, R.S.O. 1897, ch. 1, sec. 10, this meaning is attached to the word though contained in the Liquor License Act. An instance in which the word "electors" is used as meaning persons entitled to vote upon a by-law for contracting a debt even, is to be found in sec. 19 of the Act. The use of the word "electors," therefore, throws no light one way or other upon the question.

Thus far it is quite plain sailing, and I must again decline to make any deep sea investigations merely to find how difficult the passage might be if the bed of the ocean were not covered by navigable waters.

This brings me to the one arguable question on this branch of the case, namely, whether sec. 355, contained in "Title II. Respecting By-laws," and in the middle of "Division III.," is to be considered as inapplicable to voting on any by-laws except those "for contracting a debt," referred to in the next two preceding sections; and as inferentially prohibiting voting more than once upon all other by-laws. Mabee, J., considered that it was not so inapplicable; a Divisional Court considered that it was. There are several circumstances which militate against the latter judgment; there are none, as I view the case, which can be said to undoubtedly support it.

In the first place, why should not a general provision which is a proper part of a system—set out altogether under one title—of obtaining the assent of voters, be held applicable to the whole scheme? In my opinion it should, unless a contrary intention is plainly shewn. It is not for the Courts to make fish of one by-law and flesh of another. In the next place, and this is an important

fact, if the Divisional Court were right, there is no expressed provision anywhere in the Act which defines the right to vote in this respect on by-laws other than those for contracting a debt—secs. 353 and 354—unless indeed all by-laws are to be voted on as if by-laws for contracting a debt, except where otherwise expressly provided. And, in the third place, there are the plain words of the section itself, giving every ratepayer the right to vote in every ward in which he has the necessary qualification—the word “ratepayer” being in this place quite appropriate. “355. Where a municipality is divided into wards, each ratepayer shall be so entitled to vote in each ward in which he has the qualification necessary to entitle him to vote on the by-law.” What sort of foundation is this word “ratepayer” for any argument for or against this appeal? It is only “ratepayers” who can be properly assessed in more than one ward; and it is only because they are “ratepayers” in more than one ward that they can be so assessed. What other word could as appropriately be used if the intention were to confer the right to vote more than once on all sorts of by-laws?

Nothing is gained by a renewal of somewhat antiquated and threadbare discussions whether it is property which thus votes more than once, or intelligence evidenced by the acquisition of property; but the by-law was one which might very materially affect—for good or for ill—the value of property in the municipality, it was not one which could have merely a moral or immoral effect; indeed its effect upon the real property of the ratepayers might possibly be greater than that of many by-laws for contracting a debt; so that there is no reason why the right to vote more than once might not be given in the one case as well as the other.

I cannot think that we ought to determine the rights of the parties upon what were the provisions of earlier enactments, or upon the “history” of this or that section of the Act, or, without great care, upon cases decided under such enactments. As I have before said, the Act is not an unalterable scientific structure, but in truth is altered and patched as often as opportunity affords, and not infrequently for the very purpose of overruling a judgment of the Court, so that that which was the intention of the Legislature one year may be completely changed another year. We ought

C. A.

1906

RE  
SINCLAIR  
AND  
TOWN OF  
OWEN  
SOUND.

Meredith, J.A.

C. A.

1906

RE

SINCLAIR  
ANDTOWN OF  
OWEN  
SOUND.

Meredith, J.A.

to deal with the Act as it is, and to give the Legislature credit for knowing what it meant, and for knowing how to express its meaning.

The respondents' whole case rests upon the word "so"—"so entitled to vote"—in sec. 355. The Divisional Court thought that that word altered the whole effect of this section, not only restricting it to the one case of voting on by-laws for contracting debts, but, apparently, also as impliedly providing that in no other case of voting on by-laws should such a right be exercised. But why so? Why should not the words "so entitled to vote" refer to voting upon any by-law requiring the approval or assent of the "electors," the subject matter with which the Legislature was dealing in this part of the Act—Part VI., Title II. No words of the section in any way indicate that it was intended to limit the right to vote in any respect; on the contrary, they point to its having an enabling effect only. It is true that by-laws for contracting debts are mentioned in the next two preceding sections, and that the qualifications for voting upon such by-laws are therein provided, but that alone can afford no sufficient reason for applying it to them more than to the fourth, seventh, seventeenth, or any other, preceding section of that part of the Act. And it is extraordinary that the right should be given to "each ratepayer" to so vote "on the by-law," and not, as the section in its restricted form was, to "such ratepayer" on "such by-law:" if it were meant to apply only to "such ratepayer" and "such by-law." This in itself outweighs all that has been said in the respondents' favour upon this question. By sec. 351 the whole of the election procedure contained in secs. 138 to 206, inclusive, except sec. 179, is made applicable to voting on by-laws—is in effect incorporated in this Title. Why may not the words "so entitled to vote" have reference to voting under some of these provisions; or to the voters referred to in sec. 348, a section formerly restricted to persons entitled to vote under secs. 353 and 354 only, but now made applicable to voting on all by-laws: see 3 Edw. VII. ch. 18, sec. 73: in short, why is it not to apply to voting on a by-law as distinguished from voting upon a municipal election, the latter being also provided for in secs. 138 to 206? Is it not possible that the word "so" was used to distinguish between voting upon by-laws and voting at municipal elections, the provisions as to the latter having been, as I have said, incorporated into the provisions as to



the former? If it were meant to restrict the section to by-laws for contracting debts, why would not the Legislature have said so in plain words? I decline to turn their words into some such words as these:—No voter shall be entitled to vote but once except in municipalities divided into wards and upon by-laws for contracting debts.

But, if not so, why should the word “so” have reference to by-laws? The next two preceding sections do not provide for by-laws for contracting debts nor for their submission to the electors; that is provided for in Division VI., secs. 384 to 395, and in sec. 338. These two sections provide only for the qualification of voters in respect of by-laws for contracting debts. I do not propound this question in order to indicate my opinion upon the subject, but merely to shew that, if one chooses to be hypercritical, how easy it is to create difficulties—to launch one’s self into a sea of troubles.

Assuming, however, that the Divisional Court was right, and that secs. 353, 354, and 355 are all to be treated as referring only to one class of by-law, and therefore as not affecting such a by-law as that in question, that is very far from determining the right to vote upon that by-law. Does the ratepayer need the assistance of sec. 355 to entitle him to vote on such a by-law as this in every ward in which he has the necessary qualification? Why should it be assumed that there is a right to vote once only, and require the ratepayer to prove the contrary? Under sec. 158 it is expressly provided that there shall be but one vote for mayor or reeve; but that there shall be the right to vote once in each ward for alderman or councillor, where such officers are elected by wards. That would seem rather to indicate that there is the right to vote in all cases in which the voter is duly qualified and his name is upon the voters’ list, except where expressly restricted or otherwise governed in the Act. And that is much more strongly so in regard to voting on by-laws. Under sec. 348 the clerk of the municipality is required to furnish every deputy returning officer, for the purposes of the election, with a voters’ list containing the names of all persons appearing on the then last revised assessment roll to be entitled to vote in the particular ward or subdivision; and sec. 148 provides that the voters’ lists at municipal elections shall be the first and second parts of the list under the Voters’ Lists Act. It is very important to observe that prior to the consolidation of the Act in

C. A

1906

RE  
SINCLAIR  
AND  
TOWN OF  
OWEN  
SOUND.

Meredith, J.A.



C. A.

1906

RE

SINCLAIR

AND

TOWN OF

OWEN

SOUND.

Meredith, J.A.

1903, this crucial sec. 348 was restricted, that under it the names of the persons entitled to vote under secs. 353 and 354 only were to be put on the voters' lists upon which the deputy returning officers were to conduct the election, and which were to be their only guide as to persons entitled to vote. By 3 Edw. VII. ch. 18, sec. 73 (O.), the words "under the provisions of secs. 353 and 354" were struck out, and so sec. 348 became and is now unlimited in that respect. What is there, therefore, to prevent a duly qualified voter from voting in each ward? What power is there in the deputy returning officer to reject the vote? Under sec. 165 the deputy returning officer has power only to ascertain whether the name appears upon his list, and, if so, he has no power to withhold the ballot except in case of a refusal to take the proper oath. The form of oath, too, plainly indicates the right to vote in every ward in such a case as this; it requires only that the voter shall swear that he has not voted before, at this election, either at this or any other polling place in this ward, and it is only in case of voting for mayor or reeve that he is required to swear that he has not voted elsewhere in the municipality. And again, if any further indications are necessary, the oath of a voter upon a by-law under sec. 682, which is not a by-law for contracting a debt, must be only that he has not before voted in that ward: sec. 358.

It therefore seems plain to me that unless the oaths are to be remodelled, and sec. 355 is to have added to it some such restrictive words as, "but no person shall be entitled to vote upon any other by-law more than once," there is nowhere any power to prevent voting upon a by-law such as that in question in each ward in which the voter has the proper qualification; and this, of course, assuming even that sec. 355 applies only to by-laws for contracting debts. We must be content with adjudication; and should be very careful to avoid anything like a remodelling or adding to any enactment.

The contention, so well made by Mr. Frost, that the municipality in question is not now to be deemed divided into wards, because it has adopted the system of electing its aldermen "by general vote" is inaccurate, and fails, in two respects at least: because (1) the town is none the less divided into wards and all the rights which existed by reason of such division—including the right to vote on by-laws—still exist except in respect of the election

of aldermen "by wards;" all that the enactment authorizes—sec. 71 *a* (3)—and all that the by-law passed under it effects is, in substance, a change in the method of voting for aldermen, and in their number; and (2) no restriction has been imposed upon the right to vote, but indeed it has been extended; every elector has been given the equivalent of a right to vote in each ward. The enactment can affect only the subject with which it deals, the offices of mayor and alderman.

If I am right, in either respect, upon this main question, the by-law cannot stand. The majority in its favour was 476; there were 573 votes of persons entitled to vote in more than one ward; and there were 108 votes cast, which, as found by Mabee, J., were for various reasons bad. It may be very probable that the by-law would have carried if none but good votes had been cast and no good vote had been rejected or impeded. But that is not the question; it is within the range of possibility that the by-law would have been defeated at the polls, and more so within that range that had the majority been very considerably reduced, the council might not have finally passed it. It is not to be upheld on mere speculation as to probable or possible results.

Besides this, there was other misconduct in connection with the election of by no means a purely trivial character. The partizanship of the returning officer was inexcusable; and, in the end, has, as is very often the case, defeated its purpose; and given rise to protracted and costly litigation. If that officer had expended half as much energy in the performance of his simple ministerial duties, there need not have been any ground for complaint, as to the voters' lists, the confusing character of the ballots, the allowing of unauthorized persons in the polling booths, and the other violations of the law laid to his charge; without, perhaps, very materially interfering with the result. No sort of judicial encouragement should be given to prejudiced performance of duties. There ought to be easily found officers who can perform simple ministerial duties without importing a party spirit into them.

I would allow the appeal and restore the judgment of the Judge of first instance.

*Appeal dismissed with costs; MEREDITH, J.A., dissenting.*

E. B. B.

C. A.

1906

RE  
SINCLAIR  
AND  
TOWN OF  
OWEN  
SOUND.

Meredith, J.A.

[IN CHAMBERS.]

1907

BOYD V. MARCHMENT.

Feb. 12.

*Discovery—Production—Accident—“Recklessly and Negligently” driving.*

In an action for injuries to the plaintiff and his carriage, alleged to have been caused by the defendant's servants driving “recklessly and negligently,” on an examination of the defendant for discovery, he gave the names of his men who were with his waggon at the time of the accident, but he could not give the weight of the load without his books, which he declined to produce. After the examination was adjourned for the purpose of a motion to compel their production, his solicitors wrote a letter that the defendant's team was coming from a house on a certain street, and that the weight of the load and waggon together was not less than three tons. This the plaintiff declined to accept as sufficient:—

*Held*, that as the plaintiff's case rested on “recklessly and negligently driving horses and a conveyance,” which the defendant contended was impossible, on account of the weight of the load: and as it might assist the plaintiff to find out what house the team was coming from and the weight of the load, the books must be produced.

THIS was a motion on behalf of the plaintiff for a further and better affidavit on production by the defendant.

The motion was argued on the 9th of February, 1907, before MR. CARTWRIGHT, Master in Chambers, in whose judgment the facts are stated.

*J. D. Montgomery*, for the motion.

*J. E. Jones*, contra.

February 12. THE MASTER IN CHAMBERS:—The plaintiff claims damages for injuries to himself and his carriage caused by the defendant's servants driving “recklessly and negligently” on Rose avenue.

The defences are (1) want of reasonable care on part of plaintiff, and (2) in the alternative that the collision was a mere accident for which defendant is not liable.

When examined defendant says he keeps books which shew the men he employs and the work they do. These books he had not with him and on his counsel's advice declined to produce them. He gave the names of the men who were with his waggon at the time of the accident, and says they could not have been going

faster than a man could walk; he is sure that his books will tell about what the weight of the load was, but he could not give it from memory. The production of these books was refused and the examination was adjourned to allow this motion to be made. On 30th January defendant's solicitors wrote (without prejudice) that the defendant's "team in question was coming from a house on Amelia street," and "that the weight of the load and the waggon together would be not less than three tons." But they took no notice of the request to have the books produced.

Plaintiff was not satisfied with this and the motion was argued.

It was contended that the weight of the load was immaterial, as there is no defence here such as that which proved successful in *Wills v. Belle Ewart Ice Co.* (1906), 12 O.L.R. 526.

On the other hand, it was argued, that if the weight was anything like three tons, the plaintiff would find it difficult to establish any reckless or furious driving. In this view, it seems that plaintiff should have the production asked for and further examination, if it seems necessary. To find out what house on Amelia street the team was coming from and what the weight of the load was may assist the plaintiff, and this is a sufficient reason for making the order asked for. See also Bray's Digest of the Law of Discovery (1904), p. 46.

The plaintiff's case rests on "recklessly and negligently driving horses and a conveyance." The defendant in his deposition denies that this was possible. It clearly becomes material to find out how this was as a fact, and the plaintiff is entitled to have such discovery as may assist in shewing the truth. Suppose the books shew that the load was only one ton instead of three, or even less—that would be extremely helpful to the plaintiff. Assume on the other hand that it is shewn that the weight was such that the defendant is right in what he says was the rate at which the team was moving, then it may be necessary for the plaintiff to consider whether his wiser course will not be to discontinue on the best terms he can make with the defendant.

In Odgers on Pleading, 5th ed., at p. 272, it is said: "Interrogatories are not, like pleadings, confined to the material facts on which the parties intend to rely; they should be, and generally are, directed to the evidence by which it is desired to establish such facts at the trial (*Atty.-Gen. v. Gaskill*, 20 Ch.D. 519).

Master in  
Chambers.

1907

BOYD  
v.

MARCHMENT.



Master in  
Chambers.

1907

BOYD  
v.

MARCHMENT.

“Either party may interrogate as to any link in the chain of evidence necessary to substantiate his case; the question is relevant as leading up to a matter in issue in the action.” See too *Hennessy v. Wright* (No. 2), 24 Q.B.D. 445, at p. 447.

“Every document which will throw any light on any part of the case is material, and must be disclosed:” *Odgers, supra*, p. 261.

If the plaintiff is satisfied with seeing the books, no further affidavit need be filed.

The costs of this motion must be to the plaintiff in any event.

G. A. B.

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## [IN THE COURT OF APPEAL.]

IN RE MCKENNA AND THE MUNICIPAL CORPORATION OF THE  
TOWNSHIP OF OSGOODE.

C. A.

1906

Dec. 1.

*Drainage—Engineer's Report—Delay in Filing—Extension of Time—Alteration and Enlargement of Scheme—Municipal Drainage Act, R.S.O. 1897, ch. 226, sec. 8—62 Vict. (2) ch. 28, sec. 6 (O.).*

The power of extending the time for filing the report of an engineer upon a municipal drainage scheme, by sec. 9, sub-sec. 8, of the Municipal Drainage Act, as amended by 62 Vict. (2) ch. 28, sec. 6 (O.), can only be exercised under the condition mentioned in that sub-section. It is a limited power to extend for good cause, and is dependent upon inability of the engineer to make a report within the time fixed owing to the nature of the work, and not upon dilatoriness or supineness on his part.

An engineer was appointed to make examination and report in 1900, but did nothing within the first six months after his appointment. Various extensions were granted, several after the extended time had expired. No report was made till February, 1905, and such report was after amendment adopted by the council in June, 1905, and a by-law founded upon it, the engineer advancing no excuse for delay except press of work and lack of assistance:—

*Held*, that when the report was made the petition was not on foot, and therefore there was no warrant to the council for adopting the report or founding a by-law upon it.

THIS was an appeal by the above corporation from the report of J. B. Rankin, esquire, referee under the Drainage Laws of Ontario, dated March 26th, 1906, whereby the report of J. H. Moore, civil engineer, in the matter of the John O'Connor drainage scheme and by-law No. 9 of the above corporation provisionally adopting the said report, were ordered to be set aside, under the circumstances stated in the judgment of Moss, C.J.O.

The appeal was argued on November 13th and 14th, 1906, before Moss, C.J.O., and OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.

*M. Wilson*, K.C., for the appellants, contended that the petition might be proceeded upon even after the expiration of the period of six months provided by sub-sec. 8 of sec. 9 of the Municipal Drainage Act, R.S.O. 1897, ch. 226, as amended by 62 Vict. (2),

C. A.  
1906  
IN RE  
MCKENNA  
AND  
TOWNSHIP  
OF  
OSGOODE.

ch. 28, sec. 6 (O.);\* that the petition was still alive, and having been duly signed, the municipal council had jurisdiction to do the work; and that the petition being a valid petition the proceedings ought to be upheld.†

*F. R. Latchford*, K.C., for the respondents, contended that the council could not extend the time for the engineer's report except for the reasons given in the statute; that they had no power to extend the time as they had done in this case; that the fact that the statute does not provide for the event of deaths intervening among petitioners, indicates the intention that the work shall be promptly proceeded with.

December 1. Moss, C.J.O.:—This is an appeal from the report of the drainage referee, made in a proceeding instituted by notice of motion for an order to set aside and declare void a petition for a scheme of drainage, the report of the engineer of the township, and the resolution of the council adopting the report and the by-law in reference to the scheme which was provisionally adopted by the township.

The referee allowed the motion and restrained the corporation of the township from proceeding with the drainage work set forth in the engineer's report.

The township appeals, contending that the referee's decision should be reversed.

The record of the proceedings before the referee discloses a case with some features which are unusual, if not wholly exceptional, in a drainage case. A proposal by a farmer named O'Connor to provide drainage for his farm of 125 acres, by a ditch constructed under the provisions of the Ditches and Watercourses Act, seems to have developed and expanded into a scheme of drainage which

\* 62 Vict. (2), ch. 28, sec. 6 (O.). Section 9 of the Municipal Drainage Act is amended by adding thereto the following sub-sections:—

8. The report of the engineer shall be filed within six months after the filing of the petition; provided that upon the application of the engineer the time for filing the report may be extended from time to time for additional periods of six months, when the council is satisfied that owing to the nature of the work it was impracticable for the report of the engineer to be completed within the time limited by law.

† Other points were argued which, in view of the judgments, it is not material to report.

involves some 23,000 acres of land and an expenditure of over \$13,000.

The township engineer to whom O'Connor's requisition under the Ditches and Watercourses Act was referred, concluded, as the result of a friendly meeting, that no drainage scheme could be carried out under the Ditches and Watercourses Act, because it would involve an expenditure of more than \$1,000. Thereupon he prepared a petition for drainage of an area comprising between 700 and 800 acres of land under the Drainage Act, and handed it to O'Connor to procure signatures. The signatures of seven persons, forming, it is said, a majority of the owners entitled to petition in respect of the area, were affixed to the petition and, so signed, it was presented to the township council in August, 1900, and a by-law was then passed appointing the engineer to make an examination and report. No report was made until February 25th, 1905, and no excuse is shewn for the delay except a statement of the engineer that he was unable, owing to press of other work and lack of assistance, to proceed with the examination of the area involved. His report was considered by the council on March 25th, 1905, and was referred back to the engineer to amend. The amended report was made on June 1st and adopted by the council on the 20th of the same month, and on July 26th following the by-law was provisionally adopted.

Before the first report was presented to the council two of the original seven petitioners had died. Those of the remaining five who attended the meeting of the council at which the report was read on March 25th, 1905, were amazed to discover the magnitude of the proposed scheme and the expense which it involved. They would have been willing to drop proceedings or to withdraw from the petition but for the provisions of the Drainage Act, which in that event would impose upon them the engineer's costs and other expenses connected with procuring the report. The total expenses were so large that it was apparent that it would be a saving to them to allow the scheme to be carried through and bear their share of the assessment. But the applicants who were not petitioners, or interested in the area described in the petition, but are owners of land situate in the vicinity of the drain as it extends from the place of commencement towards its final outlet, and are assessed

C. A

1906

IN RE  
McKENNA  
AND  
TOWNSHIP  
OF  
OSGOODE.

MOSS, C.J.O.



C. A.

1906

IN RE  
McKENNA  
AND  
TOWNSHIP  
OF  
OSGOODE.  
MOSS, C.J.O.

for benefit and for outlet liability, were dissatisfied and took action before the drainage referee.

The chief points in dispute on the appeal were whether, having regard to the area described in the petition, the petition was to be deemed sufficiently signed when the council adopted the engineer's report and provisionally passed the by-law; whether the report was one that could be sustained having regard to the lapse of time between the appointment of the engineer and the making of his report; and, whether the by-law could properly provide for work in a natural stream with well defined banks which was made the outlet of the drain. The commencement of the drain was about 4 miles from the point where it entered the natural channel.

It appears that the engineer did nothing within the first six months after his appointment. By sec. 9 (8) of the Drainage Act, the council is empowered to extend the time for the engineer making his report, providing it is satisfied that owing to the nature of the work it was impracticable to do it within the 6 months. There were a number of extensions granted, but several of them were after the extended time had expired, so that there were periods when the engineer had no authority or right to proceed with the work and the council did not act upon the right given it by sub-sec. (9) of sec. 9, to procure another engineer to go on with the work.

These facts raise the important question whether there was a valid report upon which the council could lawfully pass a by-law for the performance of the work and the imposition of the assessments provided for by the report.

The obvious intent of the Drainage Act is that work to be performed under its provisions shall be proceeded with and brought to a termination with reasonable expedition. The nature of the injury from which relief is sought demands that there shall be no unreasonable delay in supplying the remedy which the owners of the lands to be benefited are seeking.

To unduly delay may and is almost certain to prove a serious prejudice, not only on account of the withholding of the remedy, but because of the inevitable changes in the title and proprietorship of the lands in the area described in the petition which lapse of time is almost certain to bring about. It is the duty of the council of the municipality, once it has undertaken the prosecution of the drainage scheme petitioned for, to see that it is proceeded with

as promptly as the circumstances of the case permit, and to allow no undue delay on the part of the engineer in making and filing his report.

This would be its duty apart from any legislation. But sec. 9 (8) of the Drainage Act provides that "the report of the engineer shall be filed within six months after the filing of the petition; provided that upon the application of the engineer the time for filing the report may be extended from time to time for additional periods of six months when the council is satisfied that owing to the nature of the work it was impracticable for the report of the engineer to be completed within the time limited by law." The time limited by law is six months from the filing of the petition. If an engineer fails to file his report within that time and there be no further action of any kind on the part of the council, the petition of necessity falls to the ground. But this result may be averted in either one of two ways—either the council, if satisfied that owing to the nature of the work it was impracticable for the report to be completed within the time limited, may, under sub-sec. (8), extend the time, or it may, under sub-sec. (9), employ another engineer to make the necessary report.

The power of extension given can only be exercised, however, under the condition described in sub-sec. (8). It is a limited power to extend for good cause. It is dependent upon inability of the engineer owing to the nature of the work, not upon dilatoriness or supineness on his part.

In this case there is no pretence that there was any good cause for the council assuming to extend the time. Their actions shew that very plainly. And the engineer's only excuse was, as before stated, press of other work and lack of assistance. The council, therefore, had no power and no right to assume to extend the time beyond that limited by law. Moreover, when they did assume to make extensions, the engineer allowed the periods so given to expire, and there were times when there was no authority whatever to the engineer. The petition then lapsed and could only be revived, if at all, by the council employing another engineer. But this was never done. It is said that by again assuming to extend the time for the engineer they in effect employed another engineer. But to so hold would be to countenance a direct violation of the law, and to deprive the petitioners and others interested in the drainage

C. A.

1906

IN RE  
McKENNA  
AND  
TOWNSHIP  
OF  
OSGOODE.

---

MOSS, C.J.O.

C. A.

1906

IN RE  
McKENNA  
AND  
TOWNSHIP  
OF  
OSGOODE.

MOSS, C.J.O.

scheme of the protection given by sub-secs. 8 and 9 of sec. 9. To hold that the council may without any excuse or reason retain the services of a dilatory engineer for years after he could and should have made his report, would practically place no limit on the delays that might be sanctioned. There would be nothing to hinder the council from retaining a favoured engineer for any length of time. It could retain him in a state of inaction until all the petitioners had died or left the area proposed to be benefited or had from other causes lost all interest in the prosecution of the scheme.

The proper conclusion is that when the report was made the petition was not on foot, and there was therefore no warrant to the council for adopting the report or founding a by-law upon it.

It appears a very extraordinary thing that a proceeding of this kind, which from its very nature demands expedition, should have been allowed to remain untouched for a period of nearly 5 years, and then when the circumstances have changed in several important respects, be brought forward in the form of a scheme of the magnitude of that proposed by the report and by-law. The delay, which is unexcused and inexcusable, and the change of circumstances, should have furnished the council with sufficient reasons for not permitting the matter to proceed further. If there is to be a drainage scheme such as is proposed it surely ought to be initiated at the instance not of the few persons upon whose petition this large scheme has been promulgated, but upon the petition of a fair majority of those who are proposed to be assessed for benefit. They are the persons who will be vitally interested in its performance.

One remarkable feature of the report is that it seems to shew that the scheme now proposed to be carried out is not one which will materially assist the parties to the petition, but is directed to the drainage of a different area. The report states that "on looking at the assessment plan A it will be apparent that a large area of low land is at present without sufficient drainage, and it is with a view to improve this land and adjoining properties, which are at present submerged for the greater part of the year, that the present drainage system is proposed."

It surely ought to be the case, if the proposed scheme is really for the purpose of improving this large area of low land, that the

owners who are interested in that project should be the persons to say whether or not they desire such a scheme; and certainly the parties to the present petition should not be held responsible for a scheme which has so far exceeded their intentions.

The report and by-law should not be allowed to stand; and that being so it is not necessary to deal with the other matters urged in support of the referee's decision, though it is not to be assumed that they are considered of no weight.

Whether the petition ought to be deemed sufficiently signed or not can be of little importance, for it can hardly be supposed that the council of the township would, under the circumstances, assume to procure another report and proceed with another scheme founded upon that petition.

The appeal should be dismissed with costs.

OSLER, J.A.:—I think the judgment of the drainage referee should be affirmed. The engineer's report was out of date, his authority to make it having expired and not having been renewed in the manner the Act provides for. The by-law founded upon it, therefore, cannot stand, and both were properly set aside. Whether the petition was originally defective or not as having been insufficiently signed, or whether it became so by reason of the death of two of the petitioners, is no longer material. It is a proceeding upon which the council can now no longer act, and the injunction directed by the referee against any further action upon it must stand.

Appeal dismissed with costs.

MACLAREN and GARROW, JJ.A., concurred with MOSS, C.J.O.

MEREDITH, J.A.:—The extraordinary and inexcusable delays of the defendants' council, extending over five years, were contrary to both the spirit and the letter of the drainage laws in question; and so too was the extension of the narrow limits of the area of drainage petitioned for so as to obliterate them in a great scheme covering a large portion of two townships, and the more so by reason of the action of the council in requiring the engineer to alter that scheme, and of the alteration so made, by which much, if not all, of the relief sought by the petitioners was eliminated from that scheme.

C. A.

1906

IN RE  
McKENNA  
AND  
TOWNSHIP  
OF  
OSGOODE.

MOSS, C.J.O.



C. A.

1906

IN RE  
MCKENNA  
ANDTOWNSHIP  
OF  
OSGOODE.

Meredith, J. A.

Upon these large and very obvious grounds, the appeal should be dismissed. It is not necessary to consider, or mention, any of the lesser objections to the proceedings.

The proper order would have been one quashing the by-law. I do not quite understand what is meant by "setting aside" the petition. If there were any likelihood of the defendants making use of the petition, or of the engineer's report, for the purpose of carrying on any drainage works under such petition, the proper relief would be an injunction; but injunctions are not granted before danger appears, and the less so where further action by the council, now that the by-law is set aside for the reasons before stated, seems out of the question. If the petition, or report, be good for any purpose not considered in this case, we have no right now to interfere with either of them in such respect.

A.H.F.L.

[FALCONBRIDGE, C.J.K.B.]

REX EX REL. BURKE V. FERGUSON.

1906

Dec. 28.

*Factories Act—Privies—"Factory"—"Owner"—"Employed."*

Held that a store occupied by merchant tailors, the rear part being used as a tailoring department and the front as a retail sale department, fourteen persons being employed in the former, was a "factory" as defined by sec. 2, sub-sec. i. (c) of the Ontario Factories Act, R.S.O. 1897, ch. 256, and the amendments thereto.

Under sec. 15 as amended by 4 Edw. VII. ch. 26, sec. 3 (O.), which provides that the "owner" of every factory shall provide a sufficient number of privies, etc. the owner of the building is plainly intended, who may or may not be also the employer.

CASE stated by James Morrison Glenn, police magistrate in and for the city of St. Thomas, in the county of Elgin, under the provisions of sec. 900 of the Criminal Code of Canada.

"(1) On February 1st, 1906, an information was laid, under oath before me, by James T. Burke, for that Frank H. Ferguson, being the alleged owner of a factory, and known as No. 343 on the north side of Talbot street in the city of St. Thomas, did not on January 31st, 1906, and for six months previously, provide a sufficient number and description of privies, earth or water closets and urinals for the employees of such factory, including separate sets for the use of male and female employees, and did not have separate approaches to the same as provided by the Ontario Factories Act, being R.S.O. 1897, ch. 256, and amendments thereto, and that the said Frank H. Ferguson for thirty days prior to January 31st, 1906, refused and neglected to comply with the above requirements after being notified in writing in regard to the same by the factories' inspector.

(2) On February 2nd, 1906, the said charge was duly heard before me in the presence of both parties, and after hearing the evidence adduced, I found that Frank H. Ferguson was not guilty of the charge preferred against him, but at the request of the Crown Attorney in and for the said county of Elgin, representing the Attorney-General for the Province of Ontario, I state the following case for the opinion of this honourable Court.

The facts of the case and the reasons for the conclusion of law arrived at by me, appear in my judgment hereto annexed, and

1906  
-REX  
EX REL.  
BURKE  
v.  
FERGUSON.

which forms part of this case. The said Crown Attorney, representing the Attorney-General for the Province of Ontario, desires to question my decision on the ground that it is erroneous in point of law, the question submitted for the judgment of the Court being:

1. Whether the said Frank H. Ferguson, upon the facts found by me, should or should not have been convicted of the offence charged.

Dated at St. Thomas this 29th day of September, A.D. 1906.

James M. Glenn.

"The facts of this case are as follows:

The defendant is the owner of a store on the north side of Talbot street in the city of St. Thomas, occupied by Messrs. Beal and Martin as his tenants. The lease under which they occupy the premises is in the statutory form and contains no restrictions upon the tenants as to the kind of business to be carried on by them. They have occupied the premises since May 1st, 1896, under the lease, and have, during that time, carried on the business of merchant tailors. The rear part of the building is used as a tailoring department and the front part as a sales department. They have been employing upon an average fourteen persons in the tailoring department, six males and eight females. There is only one closet upon the premises and that is in the basement of the store, and there is only one approach to it and it is used in common by male and female employees of Beal and Martin. Section 15 (1) (a) of the Factories Act, R.S.O. 1897, ch. 256, as amended by 4 Edw. VII. ch. 26, sec. 3 (O.), provides: "The owner of every factory shall provide a sufficient number and description of privies, earth or water closets and urinals for the employees of such factory, including separate sets for the use of male and female employees, and shall have separate approaches to the same, the recognized standard being one closet for every twenty-five persons employed in the factory." The inspector of factories laid an information against the defendant for non-compliance with the foregoing section of the Factories Act. It was admitted on the hearing that the defendant had been notified in writing in regard to the complaint as required by the Act, and that he refused to do anything.

Section 2 of the Factories Act provides as follows:

“(a) ‘Factory’ shall mean any building, workshop, structure or premises of the description mentioned in schedule A to this Act, together with such other building, structure or premises as the Lieutenant-Governor in Council from time to time adds to the said schedule; and the Lieutenant-Governor in Council may, from time to time, by proclamation published in the Ontario Gazette, add to or remove from the said schedule such description of premises as he deems necessary or proper.

(c) Any premises, building, workshop, structure, room or place wherein the employer of the persons working there has the right of access and control, and in which, or within the precincts of which, any manual labour is exercised by way of trade or for purposes of gain in or incidental to the following purposes, or any of them, that is to say: the making of any article or part of any article; the altering, repairing, ornamenting or finishing of any article; or the adapting for sale of any article.”

The Crown Attorney argued that the defendant came within one or the other of the above provisions and that he ought to be convicted. I shall therefore consider clause (a) first. This clause refers to schedule “A” of the Act, and unless the business carried on by Beal & Martin can be said to be a clothing factory, the defendant cannot be convicted under the authority of that clause. The word “factory” means the same thing as the word “manufactory,” and in my opinion a merchant tailor is not a manufacturer within the meaning of the Ontario Factories Act. A merchant tailor may be a manufacturer in the narrow sense of the word, but I do not think that is the meaning which ought to be given to it in construing the Factories Act. It should be construed in its popular sense, and construing the Act in that way, a manufacturer is a person who produces goods from a raw state by manual skill and labour, and goods which are commonly turned out of factories, and in my judgment a merchant tailor cannot be regarded as a manufacturer. He merely cuts and fashions a suit of clothes as ordered from cloth purchased by him and kept to be made up as suits are ordered by customers. In speaking of a city as a manufacturing centre, or having factories within it, the ordinary understanding is that it has factories where articles of use are made in considerable quantities by the aid of many hands or of machinery, and generally to be supplied to retail dealers. Viewing the Act in

1906  
 REX  
 EX REL.  
 BURKE  
 v.  
 FERGUSON.



1906

REX  
EX REL.  
BURKE  
v.  
FERGUSON.

this light, I do not think that tailor shops or merchant tailors, not engaged in wholesale trade, can be included among the factories and the manufacturers of a place. The Crown Attorney also contended that the word "owner" in sec. 15 meant the legal owner of the building, but I do not agree in that. "Factory" is defined to mean any building, workshop, structure or premises of the description mentioned in schedule A. If the business carried on in this case can be said to be a clothing factory, the defendant is not the owner of the factory—Beal & Martin are the owners.

I shall now consider clause (c). This clause may be sufficient to include a merchant tailor, but even so, I do not think that it applies to the defendant by reason of the words contained in it, namely the following words: "Wherein the employer of the persons working there has the right of access and control." The defendant is not the employer in this case. He has no right to go upon the premises except to view state of repair under the covenant in the lease giving him that right. If he were to go upon the premises except to view state of repair he would be a trespasser, and if the Factories Act imposes any duty upon him requiring him to make any alterations in or additions to the premises there is nothing in the Act exempting him from liability, and that being so I do not think the Legislature intended to include the legal owner of the building who has no interest whatever in the business carried on by others. I may also add that the Factories Act imposes substantial penalties for violations of its provisions, and it ought for that reason to be construed strictly in favour of the accused, and in any case where it is doubtful whether a particular provision applies to a person charged with a violation of such provision, the person charged ought to be given the benefit of the doubt. For these and the other reasons which I have given I think the defendant ought not to be convicted, and I therefore dismiss the charge.

This is, I understand, the first case of this kind in which a charge has been laid under the Act."

The case was argued on November 9th, 1906, before FALCONBRIDGE, C.J.K.B., in Weekly Court.

*J. R. Cartwright*, K.C., and *A. McCrimmon*, for the Attorney-General of Ontario.

*J. B. Davidson*, for the defendant, referred to: *Lister v. Lobley* (1837), 7 A. & E. 124; *Lee v. Smith* (1885), 42 Oh. 458; *Schott v. Harvey* (1884), 105 Penn. 222, 227-8; *Toller v. Spiers & Pond* (1902), 19 Times L.R. 119; Amer. and Eng. Encycl. of Law, 2nd ed., vol. 12, p. 707; Maxwell on Statutes, 4th ed., pp. 145-6, 294.

1906  
 REX  
 EX REL.  
 BURKE  
 v.  
 FERGUSON.

December 28. FALCONBRIDGE, C.J.:—The facts appear in the case, and in the judgment which is made part of the case.

With great respect, I am unable to concur in the view taken by the learned magistrate on either branch of the case.

(1) I am of the opinion that the premises in question are a "factory" as defined by the Factories Act, R.S.O., 1897, ch. 256 (as amended up to 1904 and set forth in the pamphlet published by the Ontario Department of Agriculture), sec. 2, sub-sec. 1, cl. c. It is a "building . . . wherein the employer of the persons working there has the right of access and control and in which . . . manual labour is exercised by way of trade . . . in or incidental to . . . the making of any article . . . or the adapting for sale of any article."

It is *nihil ad rem* for the purposes of the definition that the employer is not the person here charged.

(2) Then I turn to sec. 15, which provides\* that the owner of any factory "(a) shall provide a sufficient number . . . of privies, etc., . . . for the employees . . . including separate sets for the use of male and female employees" . . . with "separate approaches to the same . . . ; (b) shall be held responsible for effluvia arising from a drain, etc.; (c) shall arrange for a supply of pure drinking water."

This is plainly meant to apply to the owner of the building. These duties relate to the substantial, structural condition of the premises.

The duties imposed on the employer (who is defined by sec. 2, sub-sec. 3) relate to the domestic economy and interior management of the factory. By sec. 16, as amended by 4 Edw. VII. ch. 26, sec. 4 (O.), he is to (a) keep the factory in a clean and sanitary condition and free from effluvia arising from refuse (note here the sharp contrast, the landlord being, as stated above, liable for effluvia arising from structural defects or disrepair); (b) keep

\* *i.e.*, as amended by 4 Edw. VII. ch. 26, sec. 3 (O.).

Falconbridge,  
C.J.  
1906  
REX  
EX REL.  
BURKE  
v.  
FERGUSON.

privies, etc., in good repair and shall be held responsible for keeping closets separated for male and female employees (the owner's duty being, as stated before, to provide them); (c) to regulate the temperature; (d) to ventilate the factory; (e) not to allow overcrowding; (f) the inspector may require him to provide spittoons, etc.

Our legislation on the subject is therefore very precise, and the American cases cited, having regard to the statutes which they are said to interpret, are not in point.

I have also considered the case of *Toller v. Spiers & Pond*, 19 Times L.R. 119. I fancy that in the present case no serious opposition will be raised by the tenant if the landlord desires to enter on the premises in order to carry out the provisions of the law. Every one is supposed to know the law, and people have no right to enter into covenants or engagements which tend to put it out of their power to obey the law.

The preamble to the original Factories Act, 47 Vict. ch. 39 (O.), was: "Whereas special provision should be made for the safety, health and well-being of operatives employed in and about factories and like places within Ontario." I take it that "well-being" includes moral as well as physical well-being, and that it tends to the moral well-being of the six male and eight female persons employed in this factory that the ordinary decencies and proprieties of life should be observed. Wherefore, if my opinion on the subject were not even so strong as it is, I should endeavour to see that this important duty should not be made a shuttlecock between the "owner" and "employer." Doubtless the latter if attacked would produce argument equally specious and perhaps better founded to shew why he should not be held answerable for breach of this particular duty, but it cannot be that it is the duty of no one to carry out this provision of the law.

The answer to the question will be that the respondent Frank H. Ferguson should have been convicted of the offence charged. The matter will therefore be remitted to the magistrate with this opinion, in order that he may deal with it according to law.

A. H. F. L.

## [IN THE COURT OF APPEAL.]

## THE KING V. BURR.

C. A.

1906

Dec. 1.

*Criminal Law—Corroboration—Having Illicit Intercourse with Girl of Previously Chaste Character—Criminal Code—New Trial—Case Stated—55-56 Vict. c. 29 (D.), secs. 684, 742, 743.*

Section 684 of the Criminal Code, 55-56 Vict. ch. 29 (D.), which enacts that a person accused of offences of the nature therein indicated, *inter alia* of having illicit intercourse with a girl of previously chaste character, is not to be convicted upon the evidence of one witness unless such evidence is corroborated in some material particular, does not make it necessarily incumbent upon the Crown to adduce testimony of another or other witnesses to the acts charged. It is enough if there be other testimony to facts from which the tribunal trying the case, weighing them in connection with the testimony of the one witness, may reasonably conclude that the accused committed the act with which he is charged.

New trial ordered after a case stated under sec. 743 of the Criminal Code, and the propriety of so doing discussed.

CASE stated by the acting chairman of the general sessions of the peace for the county of Kent, pursuant to the direction of this Court; under sec. 743 of the Criminal Code, 55-56 Vict. ch. 29 (D.)

The accused was placed on trial at the sittings of the general sessions of the peace for Kent in June, 1906, at which the junior Judge of the county was presiding as chairman.

The indictment charged that the accused seduced and had illicit intercourse with a girl of previously chaste character above the age of 14 years and under the age of 16 years, not being his wife.

The girl testified to acts of illicit intercourse between her and the accused, and other witnesses were examined for the purpose of corroborating her testimony.

At the conclusion of the evidence for the Crown the learned chairman ruled that there was not the corroboration required by sec. 684 of the Criminal Code, and he withdrew the case from the jury and directed the accused to be discharged.

The question submitted was whether the ruling was right.

The case was argued on November 12th, 1906, before Moss, C.J.O., and OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.



C. A.  
1906  
REX  
v.  
BURR.

*J. R. Cartwright*, K.C., for the Crown, contended that the evidence was stronger than in *Rex v. Dawn* (1906), 12 O.L.R. 227, and should have gone to the jury; that there was sufficient corroboration within the meaning of the Criminal Code, which only requires that there shall be some evidence to strengthen that of the principal witness; and that anything which goes to shew that the story told is, as regards the accused, probable, should suffice: *Radford v. Macdonald* (1891), 18 A.R. 167; *Harvey v. Anning* (1903), 67 J.P. 73.

*O. L. Lewis*, for the prisoner, contended that in all the cases cited there was evidence of pregnancy; that here no medical testimony was adduced; and no evidence of any one, except the girl herself, of any disturbance of physical condition; that it was for the Judge to say whether there was corroborative evidence; that statements made before the act charged were not sufficient; that the decision in *Rex v. Dawn*, *supra*, was based largely on *Parker v. Parker* (1881), 32 C.P. 113, but that was a decision under a statute in which the language was much wider than that in question here, as is also the case with the Canada Evidence Act, and the Bastardy Act; and that evidence consistent with either of two views cannot be called corroborative: *In re Finch*, *Finch v. Finch* (1883), 23 Ch. D. 267. He also referred to *Reg. v. McBride* (1895), 26 O.R. 639, 2 Can. C.C. 544; *Reg. v. Giles* (1856), 6 C.P. 84; *Rex v. Burns* (1901), 1 O.L.R. 336, at p. 339; Wills on Circumstantial Evidence, 5th ed., at pp. 239, 262; *ibid.* American notes, p. 272, F.; Phipson on Evidence, 3rd ed., p. 455; Canadian Criminal Cases, vol. 2, p. 261; Snow's Annotated Criminal Code, p. 368.

*Cartwright*, in reply, contended that the question really was whether there being conflicting evidence the case should not have gone to the jury.

December 1. Moss, C.J.O. [after stating the facts as above]:—Under sec. 684 a person accused of an offence of the nature charged in this case is not to be convicted upon the evidence of one witness unless such witness is corroborated in some material particular by evidence implicating the accused.

This does not necessarily make it incumbent upon the Crown to adduce testimony of another or other witnesses to the acts charged. To do so would be to virtually render a conviction impossible in the majority of cases like the present.

It is enough if there be other testimony to facts from which the jury, or other tribunal trying the case, weighing them in connection with the testimony of the one witness, may reasonably conclude that the accused committed the act with which he is charged.

In this case it was shewn that the accused was seen taking improper liberties with the girl on more than one occasion, and that he had on at least two occasions expressed a strong desire for sexual intercourse with her.

And there was also given in evidence a statement made by him after the alleged offence from which it might not unreasonably be inferred that he had availed himself of the opportunity afforded him through the absence from home for some days of the girl's parents, during which time he was in charge of the house where the girl and her young brothers and sister were.

These matters were material to the charge, and pointed to the accused as the perpetrator of the offence, and they should not have been withdrawn from the jury.

The answer to the question, therefore, should be in the negative, and under all the circumstances of the case a new trial should be directed.

It may, however, be pointed out that sec. 746 of the Code does not make it obligatory on the Court to direct a new trial in every case which comes before it under the jurisdiction conferred by the Code.

The language of the section is permissive, and the Court, in addition to the other powers conferred upon it, is enabled to make such other order as justice requires.

The matter is left to the Court to exercise its discretion in each case as the circumstances seem to require.

It follows that there can be no general rule, and the Court ought not to attempt to lay down, in any one case, the considerations which should govern in another. The considerations influencing the exercise of discretion in one class of cases may differ materially from those affecting it in another class. Especially may this be so in cases where the accused has been discharged and the Crown is appealing. There the considerations that would govern where the accused was convicted and was the appellant, would not necessarily be applicable: *Rex v. Karn* (1903), 5 O.L.R. 704.

Having regard to the nature of the offence and the circumstances

C. A.  
1906.

REX  
v.

BURR.

MOSS, C.J.O.

C. A.  
1906  
REX  
v.  
BURR.

under which it has been sworn it was committed, the present case is one in which the discretion should be exercised in such manner as to afford the Crown an opportunity of once more putting the law in motion against the accused if it thinks fit to do so.

Moss, C.J.O.

GARROW and MACLAREN, JJ.A., concurred.

OSLER, J.A.:—I agree that there was evidence which ought not to have been withdrawn from the jury corroborating in some material particular the evidence of the prosecutrix implicating the accused.

I should, however, have been better satisfied if the Court in its discretion had thought fit not to direct a new trial, seeing that the Crown did not press for it and that, as stated in the argument, the prisoner had left the country. To place a prisoner who has been acquitted a second time upon his trial, even where his acquittal has resulted from some erroneous ruling by the trial Judge, is a course which in my judgment should very rarely be adopted. It does not follow, and the Criminal Code has not said so, that because the trial Judge has been found to have gone wrong there must be a new trial. A very wide discretion has been entrusted to the Court on an appeal of this nature, *i.e.*, an appeal by way of a case stated, which is one of those provided for by sec. 742 of the Code. A new trial may be directed, or such other order made as justice requires. Clearly it is the duty of the Court to consider all the circumstances of the case, among which are its importance to the public, the magnitude of the offence, the fact that the accused has already undergone a trial, and whether, having regard to the evidence, anything seems likely to be gained by a further trial of the case. In most cases of the kind the ends of justice would be fully satisfied by a decision upon the point of law which would be a guide for the future.

I have more than once pointed out that it is not for the Judge who states the case to say what is to be the result of the opinion of the Court of Appeal on the questions stated. That is left to the Appellate Court in whom the Act reposes a very wide discretion.

MEREDITH, J.A.:—Unless the case of *King v. Dawn*, 12 O.L.R. 227, and the cases referred to in it, were wrongly decided, this was a case for the jury. There is no good reason for thinking they

were. If they are inconsistent with the case of *Reg. v. Vahey* (1899), 2 Can. C.C. 258, they should prevail.

It is true that there is not in this case that indisputable evidence of sexual intercourse which existed in the other cases, but there are several circumstances of corroboration, two of which only need be referred to. The accused's statement to one of the witnesses is open to the inference that he had the desire to do that which he is charged with having done, and would have paid \$10 to have that desire gratified; and his admission to another witness is open to the inference that he had the opportunity, and that the girl's parents were to blame for that and for his taking advantage of it. It is for the jury to say whether this statement, and this admission, were really made, and, if so, what they meant. If they find that they were made, and that they meant that which I have mentioned, they are something more than corroboration. There is no difficulty in the Court explaining to the jury the effect of their findings on the question of corroboration, when that is necessary, nor in their acting accordingly; that is necessary in almost every case, for the jury may not find, or believe, any corroborative evidence, and must be charged that they cannot find the accused guilty on the testimony of the accuser only. This case was plainly, I think, one for the jury.

The learned chairman of the sessions has rightly stated what the effect of this conclusion should be. There ought to be a new trial. That logically follows; that can be the only proper object of the reserved case; and should be the general rule. There may be cases in which it might not be proper to make such an order; but there is not anything of an exceptional character in this case; and unless there is to be a general rule that a new trial will not be granted, and the purpose of the enactment is to be thereby frustrated, and cases of this sort turned into academic discussions, there must be a direction for a new trial. It was never intended that this Court should impede a proper trial of an accused person, should usurp the power of the Crown to do that which would be equivalent to entering a *nol. pros.*, or the power of a jury to acquit—and that without a proper trial—such a person. Our conservative notions of the old rule, that no one should be twice put in jeopardy for the one offence, must not lead us to practically repeal the enactment which has broken the rule down.

C. A.

1906

REX

v.

BURR.

Meredith, J. A.



## [DIVISIONAL COURT.]

D. C.

1906

June 14.  
Dec. 12.

ADAMS V. FAIRWEATHER.

*Way—Public Lane—Strip of Land Adjoining Used as Part of—User as One of the Public—Easement.*

To constitute a legal possession of land, not only must there be a corporeal detention, or that quasi detention, which, according to the nature of the right, is equivalent thereto, but also the intention to act as owner of the land; no legal possession is acquired by the exercise of a supposed right as one of the public.

The rear portions of the plaintiff's and the defendant's lands abutted on a public lane, a strip of land between the fence erected on defendant's land and the boundary of the lane being unenclosed. The plaintiff, for over 20 years, believing this strip to be a part of the lane, had been accustomed to drive over it to get to his stable, doing so in the exercise of a supposed right as one of the public, and not as an easement to his land:—

*Held*, that he had not acquired any right to use the strip.

THIS was an appeal from the judgment of Mulock, C.J. Ex.D., dismissing an action for a declaration that the plaintiff was entitled by prescription to a right of way appurtenant to his premises, being lot 119 on the east side of Bleeker street, in the city of Toronto, over a strip of land, part of the rear end of the defendant's property, known as street numbers 610, 612, and 614, on the west side of Ontario street.

The action was tried at Toronto, on March 7th, 1906.

*I. F. Hellmuth*, K.C., and *H. E. Rose*, for the plaintiff.

*W. H. Blake*, K.C., for the defendant.

The learned Chief Justice reserved his decision, and subsequently delivered the following judgment:—

June 14. MULOCK, C.J.:—The properties of the plaintiff and defendant abut on a narrow street twelve feet wide, called Darling avenue, running north and south, and which at its southerly end joins a lane running easterly along the southerly limit of premises 610 to Ontario street.

Adjoining number 610 on its north side is number 612, and next to 612 is number 614. The total width of these three premises on Darling avenue is fifty feet.

The strip in question is about ten or eleven feet wide, and extends a distance of thirty-three feet wholly across the rear ends

of 610 and 612, and also in triangular shape for a few feet into 614, the total length of the Darling avenue side of this strip being about forty feet and of the easterly side of it about thirty-three feet. The shorter side does not extend into number 614. The rear end of the plaintiff's premises is about opposite the rear end of numbers 612 and 614.

Mrs. Adams, the plaintiff's wife, acquired the property now owned by the plaintiff in 1880, and in 1881 she, with her husband and family, took up her residence upon it, residing there until her death in 1900, when she devised it to her husband, the plaintiff, who has ever since continued to be the owner and occupant thereof.

About the time of her first occupying it she had a stable built on the rear part of the property, at a distance of about twenty feet back from the westerly limit of Darling avenue, but in the year 1890 or 1891 it was moved to within four or five feet of Darling avenue.

Some years before Mrs. Adams' purchase of her property a fence had been erected along the rear end of numbers 610, 612, and 614, on the east limit of Darling avenue, and a stable stood at the rear of number 610, just inside the fence, but prior to such purchase this fence and stable had disappeared, and a stable had been erected further in on the lot, the west side thereof being about eleven feet easterly of Darling avenue. From the north-west corner of this stable a fence had been constructed northerly, keeping at about eleven feet easterly of Darling avenue, and upon its reaching the northerly limit of number 612, it proceeded in a north-westerly direction until it reached the easterly limit of Darling avenue, at a point about half-way across number 614. The portions of premises numbers 610, 612, and 614 westerly of the line thus formed by the stable and fence constitute the strip in question. They were never thereafter enclosed, and except as herein-after mentioned, from May, 1881, until December, 1905, there was nothing to prevent the public, including the plaintiff and Mrs. Adams, his predecessor in title, using the strip as a way.

Much traffic passed along Darling avenue, and the strip was freely used by the public, especially in order to allow vehicles to pass each other.

The plaintiff testified that when his wife purchased the property the strip was unenclosed; that he thought it formed part of Darling

D. C.

1906

ADAMS

v.

FAIR-

WEATHER.

Mulock, C.J.

D. C.

1906

ADAMS

v.

FAIR-

WEATHER.

Mulock, C.J.

avenue, and that he remained under that impression until December, 1905, when the defendants commenced to build upon it.

It was shewn at the trial that the plaintiff's wife, during her occupancy of her property, and that her husband since, had continuously kept a horse and carriage, using therefor the stable on plaintiff's land, and that the way to and from this stable was by way of Darling avenue, and that it was their habit to drive in and out by way of Darling avenue.

The plaintiff testified that from May, 1881, until the commencement of this action it was his daily practice, when returning to approach the stable from Ontario street by the lane referred to, to turn the corner of Darling avenue close to the stable, driving northerly along the strip, keeping as close as possible to its easterly limit, until about opposite to his stable, in order to get a wider turn into his stable, and that in driving out of the stable he drove across Darling avenue upon the strip. He also testified that only by following such a course could he conveniently drive in and out of his stable. There was some conflicting evidence as to this latter point, and some testimony going to shew that the plaintiff had not used the strip in manner claimed by him, but the fair inference from the evidence is, I think, that from May, 1881, until the commencement of this action the plaintiff was in the habit of driving to and from his stable, using the strip in the manner and under the conditions and circumstances hereinafter mentioned.

It appears that a stable had also been erected on premises number 612, and that in the year 1885 or 1886 one Arthur Wilby, a carter, rented first this stable and later the southerly stable on premises number 610, occupying them, in all, for about three years; that the plaintiff himself, in about the year 1890, rented the stable on premises number 610 for a year; that one Alfred Tourgis on the 1st of June, 1894, rented and occupied the stable on premises number 610 for three years and a half; and that in 1898 or 1899 one Alexander Wilby rented and occupied this stable for four or five years. It was the practice of these tenants, other than the plaintiff, to make use of this strip as an adjunct to the stables, storing their vehicles there, and otherwise using it as if the right to do so passed to them under the demise of the stables.

Mrs. Hogg, who leased the stable to Tourgis in 1894, objected to his cleaning his horses and storing his vehicles in the yard to

the east of the stables, giving him to understand that the strip was available for that purpose. Tourgis accordingly so used and occupied it during a considerable portion of his tenancy. Thus it would seem that during the twenty years prior to the commencement of this action, omitting the year of the plaintiff's tenancy of the stable on premises number 610, the strip had been so used by various tenants for periods amounting in all to about one-half of the period of twenty years, during which the plaintiff contends that he and his predecessor in title had been enjoying a way over it as of right.

During this period of about ten years there were many circumstances to interrupt the plaintiff's passage over this strip. The doors of the stable opened outwards. The tenants were in the habit of cleaning and feeding their horses upon it, and storing their vehicles thereon for long periods. This user constantly obstructed the plaintiff when desiring to drive over the strip. For about two years one tenant, Alfred Tourgis, stored his vehicles on the strip, not always in the same place, but leaving them wherever he chose. He had an express waggon, a large covered waggon, and a runabout, all of which, at one time or another, were stored on this strip of under eleven feet in width. The plaintiff drove past daily, saw these obstructions, which must have interfered with his passage over the strip, but at no time protested or made any objection of any kind to such user. Alexander Wilby's user of the strip for four or five years must also have seriously interfered with anyone seeking to drive over it. Not only was he in the habit of leaving his vehicles on the strip, but it was usual for him to feed his horse there. Arthur Hogg, who at this time was tenant of the stable on premises number 612, was in the habit of leaving his waggon on the strip, and Wilby would drive his horse to the rear end of Hogg's waggon and feed him there, using Hogg's waggon as a manger.

Frequently, whilst the strip was being so used, the plaintiff would arrive, and his passage over it being interfered with by Wilby's vehicles, he would, in a friendly, "neighbourly" way, ask Wilby to move his waggon, so as to allow him to pass. This Wilby would do. The plaintiff, however, at no time raised any objection to the use Wilby was making of the strip, or claimed any right to use it himself. In the absence of the occupants, the plaintiff, in order

D. C.

. 1906

ADAMS

v.

FAIR-  
WEATHER.

Mulock, C.J.



D. C.  
1906

ADAMS

v.

FAIR-  
WEATHER.

Mulock, C.J.

to be able to pass, would move the vehicles out of his way, and then replace them.

Thus, it appears that for about ten years of the twenty immediately preceding the commencement of this action, various tenants of the stables now the property of the defendant were in occupation of the strip, and making such use of it as to interrupt his driving over it, unless the obstructions were removed; that sometimes, in response to his friendly request, the party in occupation would remove such obstruction and allow him to pass; at other times the plaintiff would remove the obstruction and, on passing it, replace it, and that on no occasion did he remonstrate with any one of the persons causing such obstructions, or claim to be entitled to a way as of right.

The only case sought to be made at the trial, on behalf of the plaintiff, was an enjoyment of the easement in question by himself and his predecessor in title from May, 1881, until December, 1905, a period less than twenty-five years, and he claims to have shewn such enjoyment, as, under R.S.O., ch. 133, establishes a right in him to the easement in question. Section 35 of the statute enacts that "no claim which may lawfully be made at common law by custom, prescription or grant to any way . . . to be enjoyed . . . upon, over or from any land . . . when such way . . . has been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years shall be defeated or destroyed by shewing only that such way . . . was first enjoyed at any time prior to the period of twenty years, but, nevertheless, such claim may be defeated in any other way by which the same is now liable to be defeated."

This section applies to a claim at common law, and does not change the common law characteristics of the prescriptive enjoyment necessary in order to create a right: *Sturges v. Bridgman* (1879), 11 Ch. D. 852, at p. 863, and the question, therefore, is, whether the nature of the enjoyment by the plaintiff and his predecessor in title was such as at common law would, if of sufficient duration, have created a right in him, and, if so, whether such enjoyment has existed for a period of twenty years next before the commencement of this action, as required by secs. 35 and 37 of the statute: *Goddard's Law of Easements*, 6th ed., 220, and cases cited in notes (h), (i). The words "enjoyed by any person claiming right thereto,"

in sec. 35, and "the enjoyment thereof as of right," in sub-sec. 2 of sec. 38, following the language of the Imperial Statute, 2 & 3 Wm. IV., ch. 71, sec. 2 and sec. 5, have been the subject of frequent judicial interpretation.

In *Bright v. Walker* (1834), 1 C.M. & R. 211, at p. 219, Parke, B., says: "In order to establish a right of way, and to bring the case within this section, it must be proved that the claimant has enjoyed it for the full period of twenty years, and that he has done so 'as of right,' for that is the form in which by sec. 5 such a claim must be pleaded; and the like evidence would have been required before the statute to prove a claim by prescription or non-existing grant. Therefore, if the way shall appear to have been enjoyed by the claimant, not openly and in a manner that a person rightly entitled would have used it, but by stealth, as a trespasser would have done—if he shall have occasionally asked the permission of the occupier of the land—no title would be acquired, because it was not enjoyed 'as of right' . . . So it must have been enjoyed without interruption. Again, such claim may be defeated in any other way by which the same is now liable to be defeated; that is, by the same means by which a similar claim, arising by custom, prescription, or grant, would now be defeasible; and, therefore, it may be answered by proof of a grant, or of a license, written or parol, for a limited period, comprising the whole or part of the twenty years, or of the absence or ignorance of the parties interested in opposing the claim and their agents during the whole time that it was exercised."

In *Monmouth Canal Co. v. Harford* (1834), 1 C.M. & R. 614, in which the defendants claimed a way arising from twenty years' uninterrupted user as of right over plaintiff's land, the parties having given evidence of enjoyment with their leave and license, Lord Lyndhurst, C.B., says at p. 631: "The simple issue is, whether there has been a continued enjoyment of the way for twenty years, and any evidence negating the continuance is admissible. Every time that the occupiers asked for leave, they admitted that the former license had expired, and that the continuance of the enjoyment was broken."

Following *Bright v. Walker* and *Monmouth Canal Co. v. Harford*, Lord Denman, in *Tickle v. Brown* (1836) 4 A. & E. 369, at p. 382, says: "'The enjoyment as of right' must mean enjoyment had,

D. C.

1906

ADAMS

v.

FAIR-  
WEATHER.

Mulock, C.J.

D. C.  
1906  
ADAMS  
v.  
FAIR-  
WEATHER.  
Mulock, C.J.

not secretly or by stealth, or by tacit sufferance, or by permission asked from time to time, on each occasion or even on many occasions of using it; but an enjoyment had openly, notoriously, without particular leave at the time, by a person claiming to use it without danger of being treated as trespasser, as a matter of right."

Again, in *Earl de la Warr v. Miles* (1881), 17 Ch. D. 535, at p. 591, which was an action by the lord of the manor, questioning the right claimed to have been acquired by prescription to cut litter, Brett, L.J., says: "The true interpretation of those words 'as of right' seems to me to be that he has done so upon a claim to do it, as having a right to do it without the lord's permission, and that he has so done it without that permission. If he shews that he has claimed to do it, not as a thing permitted to him year by year by the lord, but as a thing he had a right to do, whether the lord said 'you may do it' or not; he has proved all that it is necessary for him to prove."

In *Hollins v. Verney* (1884), 13 Q.B.D. 304, Lindley, L.J., says at p. 315: "No actual user can be sufficient to satisfy the statute, unless during the whole of the statutory term (whether acts of user be proved in each year or not) the user is enough at any rate to carry to the mind of a reasonable person who is in possession of the servient tenement, the fact that a continuous right to enjoyment is being asserted, and ought to be resisted if such right is not recognized, and if resistance to it is intended."

In *Union Lighterage Co. v. London Graving Dock Co.*, [1902] 2 Ch. 557, Romer, L.J., at p. 570, says: "A prescriptive right to an easement over a man's land should only be acquired when the enjoyment has been open—that is to say, of such a character that an ordinary owner of the land, diligent in the protection of his interests, would have, or must be taken to have, a reasonable opportunity of becoming aware of that enjoyment." And in the same case Sterling, L.J., at p. 573, says: "No right had been acquired by the defendants by reason of the continuance of the rods and ties under the plaintiff's land for upwards of twenty years . . . because the enjoyment of the defendants had not been open—in this sense, that it had not come to the plaintiffs' knowledge, and was not of such a nature that their attention ought reasonably to have been drawn to it."

In *Dalton v. Angus* (1881), 7 App. Cas. 740, Lord Penzance says at p. 805: "The defendant's power of interruption means something very different from the mere physical possibility of interrupting. It involves knowledge that the necessity for support existed."

Construing the plaintiff's conduct, which also binds his wife, in the light of these decisions, it appears to me impossible to reconcile it with that of a person enjoying an easement as of right. For a period of about ten years he allowed his daily passage over the strip to be interrupted, in manner above described, by occupants of stables on the lands now owned by the defendants. If one of the occupants were present, and his horse or vehicle were in the way, it was his practice to request him to remove it sufficiently to enable him to pass, and his requests were complied with. On these occasions he was enjoying the privilege, not as of right, but by leave and license of the occupant, without which he would have been a trespasser. At other times, in the absence of the occupant, it was his practice to remove and replace any vehicle that interrupted his passage, thus recognizing the right of the occupants to the use which they were making of the strip, and at no time during all these years, when the strip was being used practically as a private yard, did he raise any objection to such user, or intimate that he was entitled to a right of way which was being unlawfully interfered with. Thus acquiescing in the user which these various occupants were making of the strip his enjoyment was not open and notorious, manifest to the world, and would not have conveyed to the mind of the owner of the servient tenement the fact that the plaintiff was asserting a claim that would, if acquiesced in, ultimately ripen into a right. Rather it was calculated to create the opposite impression, that the plaintiff made no claim, but by the favour of others was willing to enjoy a privilege which might at any moment be terminated, if he were to manifest an adverse attitude. Such conduct appears to me wholly irreconcilable with the theory of a lost grant, presumption of which is necessary in order to his succeeding; and lost grant is presumed only where the circumstances are such as would have existed if, in fact, there had been a grant: *per* Field, J., in *Dalton v. Angus*, *supra*, 756.

When the circumstances are not such, or when it appears very improbable that a grant ever was made, then, in either case, the presumption does not arise: *Goddard's Law of Easements*, 5th ed.,

D. C.  
1906  
ADAMS  
v.  
FAIR-  
WEATHER.  
Mulock, C.J.



D.C.

1906

ADAMS

v.

FAIR-  
WEATHER.

Mulock, C.J.

191, and title by prescription to a way resting upon the legal fiction of lost grant, the absence of such presumption defeats the claim.

To give rise to such presumption, it was necessary for the plaintiff to have shewn continuous actual enjoyment "as of right" for a period of twenty years next, before the commencement of this action. Having failed to do so, he has failed to establish a title by prescription, and his action fails.

Further, the plaintiff's testimony was to the effect that he used the strip in the belief that it formed part of the public street.

Therefore, he was enjoying it as one of the public, and not as of right within the meaning of the statute, which applies only to a case of dominant and servient tenement.

His form of action, as at present constituted, being based upon the statute and the doctrine of lost grant, he is not entitled to set up a case resting upon a different kind of enjoyment: *Shuttleworth v. Le Fleming* (1865) 19 C.B.N.S. 687, 709. Even if this difficulty in the plaintiff's way were removable by amendment, I am unable to see such merit in his case as entitles him to leave to amend.

For these reasons the action should be dismissed with costs.

The plaintiff may, I think, overcome the comparatively trifling inconvenience occasioned to him by exclusion from the defendant's land by a slight re-arrangement of his own premises, and, therefore, even if I had reached a different conclusion on the merits, damages, instead of relief sought, would have fully met the requirements of the case.

From this judgment the plaintiff appealed to the Divisional Court.

On November 9th, 1906, the appeal was heard before TEETZEL, ANGLIN and MAGEE, JJ.

*H. E. Rose*, for the appellant.

*W. H. Blake*, K.C., for the respondent.

December 12. MAGEE, J.:—The strip in question, which is alleged to be the servient tenement, adjoins the east side of the lane called Darling avenue, the plaintiff's land, in respect of which

he claims the right of way, being on the opposite side of the lane. The lane was a public thoroughfare, and the plaintiff says that he "always considered the strip was part of the lane, and never thought it was anything else," and he "always" (that is, throughout the twenty years) "thought he had a right," and all his witnesses likewise considered it part of the lane, and said that the public used it as such, and he says the "general traffic" "would be nearly all on that piece." The evidence for plaintiff, if it established any way at all, established it as a public way.

In *Earl de la Warr v. Miles*, 17 Ch. D. 535, James, L.J., says, at p. 585: "For instance, if the owner of a particular house in London shews that he and all the people who have lived in that house have for a long period gone every year to Hampstead Heath and run about the heath, he cannot thereby establish a particular right, as annexed to that house, to go upon Hampstead Heath, when it is quite clear that he only went there like every other person who went from London to recreate himself there."

Brett, L.J., at p. 594, says: "If their actual user, therefore, had been not merely the taking of the litter for the use of the farm, but the taking of litter generally, although part of it was used on the farm, then I think we should have had to consider, at all events, the ruling of the Master of the Rolls in *Hammerton v. Honey* 24 W.R. 603, 604. In such a case to allow a right to be established to take litter for the use of the farm would be what I should call taking only part of the claim, and I should be inclined to think that if that had been the user proved, the claim to take litter in respect of the farm could not have been supported. But if all that was taken was taken for the use of the farm, then the assuming to take it under an erroneous mind, or in respect of an erroneous claim, seems to me immaterial." And Cotton, L.J., who agreed with Lord Justice Brett, says, at p. 597: "But, no doubt, it must be shewn that the acts of the defendant are acts of user in connection with his particular tenement," and he goes on to refer to *Blewett v. Tregonning* (1836), 3 A. & E. 554, and *Hammerton v. Honey*.

In *Gale on Easements* (at p. 164 7th ed., 1899), it is said: "Prescription may be defined to be—A title acquired by possession had during the time and in the manner fixed by law. . . . To constitute a legal possession there must be not only a corporeal deten-

D. C.

1906

ADAMS

v.

FAIR-  
WEATHER.

Magee, J.

D. C.

1906

ADAMS

v.

FAIR-  
WEATHER.

Magee, J.

tion, or that quasi detention which, according to the nature of the right, is equivalent to it, but there must also be the intention to act as owner. Thus, no legal possession is acquired by a man walking across the land of his friend, or using a private way thinking it to be a public one; or unless he would do the act in defiance of opposition.

Here the plaintiff, on his own shewing, was not exercising an easement in respect of his land, but only a supposed right as one of the public—a claim which the defendant was not called upon to meet.

The appeal should be dismissed and with costs.

TEETZEL and ANGLIN, JJ., concurred.

G. F. H.

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## [IN THE COURT OF APPEAL.]

## IN RE ONTARIO MEDICAL ACT.

C. A.

1906

Nov. 21.

*Medicine and Surgery—Ontario Medical Act—"To Practise Medicine"—Use of Drugs and other Substances—Construction—Reference by Lieutenant-Governor—"Provincial Question"—R.S.O. 1897, ch. 84—Ibid. ch. 176, sec. 49.*

*Held* (MEREDITH, J.A., dissenting), that the words "to practise medicine" in sec. 49 of the Ontario Medical Act, R.S.O. 1897, ch. 176, cannot be construed except as concrete cases arise, further than in some such way as follows: if it were shewn that a person not registered under the Ontario Medical Act attempted to practise the cure or alleviation of disease by methods and courses of treatment known to medical science, and adopted and used in their practice by medical practitioners registered under the Act, or advised or prescribed treatment for disease or illness such as would be advised or prescribed by the registered practitioners,—then, although what was done, prescribed or administered, did not involve the use or application of any drug or other substance having or supposed to have the property of curing or alleviating disease, he might be held to be practising medicine within the meaning of this section.

*Per* GARROW, J.A.:—A person may always do his own diagnosing, and buy and use what he chooses (except certain poisons), upon himself. The patient may legally go, under such circumstances, not only to a druggist, but to the Christian Scientist, the osteopath, the medical electrician, the masseur, etc., and obtain and pay for the treatment which these persons give, so long as he does his own diagnosing and prescribing. So also *per* MACLAREN, J.A.

*Per* MEREDITH, J.A.:—The words "practise medicine" in sec. 49 should be given their primary and popular meaning, namely, practising the art of healing the sick by means of medicines or drugs.

*Held* also (GARROW, J.A., doubting, and MEREDITH, J.A., dissenting), that a reference to this Court to determine the construction of the above section was competent to the Lieutenant-Governor in Council, under R.S.O. 1897, ch. 84, sec. 1, being "An Act for Expediting the Decision of Constitutional and other Provincial Questions."

Moss, C.J.O., and GARROW, J.A.:—Under such a reference as this, the Court is to be guided, in giving its opinion, by the settled decisions, and unless in the case of conflicting decisions, it is not to pronounce upon whether they ought or ought not to have been decided as they were. The decisions cannot be reviewed by the Court as if the reference was an appeal from them or any of them.

THIS was a reference to the Court of Appeal by the Lieutenant-Governor-in-Council, of the question as to the construction of sec. 49 of the Ontario Medical Act, R.S.O. 1897, ch. 176, set out in the judgment of Moss, C.J.O.

Section 49 is as follows: "It shall not be lawful for any person not registered to practise medicine, surgery or midwifery for hire, gain, or hope of reward, and if any person not registered pursuant to this Act, for hire, gain or hope of reward practises or professes to practise medicine, surgery or midwifery, or advertises to give



C. A.  
1906  
IN RE  
ONTARIO  
MEDICAL  
ACT.

advice in medicine, surgery, or midwifery, he shall, upon a summary conviction thereof before any Justice of the Peace, for every such offence, pay a penalty not exceeding \$100 nor less than \$25.

The question was argued on September 18th and 19th, 1906, before MOSS, C.J.O., and OSLER, GARROW, MACLAREN, and MEREDITH, J.J.A.

*W. Nesbitt, K.C., and H. S. Osler, K.C.,* for the College of Physicians and Surgeons, referred on the meaning of the word "medicine" to the Imperial, Century, Standard, and Webster's dictionaries, also to Hooper's Medical Dictionary, Gould's Illustrated Dictionary of Medicine, and Wharton's Law Lexicon, and to Taylor's Law relating to Physicians, pp. 22, 24, 39; and cited the following cases: *College of Physicians v. Rose* (1703), 6 Mod. 44, 3 Salk. 17; *Regina v. Hall* (1885), 8 O.R. 407; *Regina v. Stewart* (1888), 17 O.R. 4; *Regina v. Coulson* (1893), 24 O.R. 246; *Regina v. Howarth* (1894), 24 O.R. 561; *Regina v. Coulson* (1896), 27 O.R. 59, 61; *Queen v. Barnfield* (1895), 3 Can. C.C. 161; *Queen v. Valleau* (1900), *ib.*, 435; and asked for such a wide construction of the words of the section as should give a due protection to the public against the practising on their bodies by ignorant persons for a fee, and cover any kind of treatment which has for its object the curing of disease.

*S. H. Blake, K.C., and J. E. Day,* for the Osteopaths, contended that the only possible answer to the question must be "sometimes such a person 'practises medicine' within the meaning of the section; sometimes he does not;" that it was only in a concrete case such a question could be answered to any purpose; that the Act in question could not be supposed to refer to matters quite unknown when the original Act 55 Geo. III. ch. 10, was passed, there being nothing to change the original signification of the terms used; and that the Act, which must be read as a whole, applied only to certain skilled professions. They referred to Viner's Abridgment, vol. 17, p. 342; *Rose v. College of Physicians* (1703), 5 Br. P.C. 553; *Nelson v. State Board of Health* (1900), 108 Ky. 769; *State v. Liffing* (1899), 46 Lawyers' Rep. Ann. 334; *The Royal College of Physicians v. General Medical Council* (1893), 62 L.J.N.S. (Q.B.) 329, 332.

*Hamilton Cassels, K.C., and R. S. Cassels,* for the First Church of Christian Scientists, referred to various statutes relating to the

subject in question, subsequent to 55 Geo. III. ch. 10, the original Act: 59 Geo. III. ch. 13; C.S.U.C. ch. 40; 22 Vict. ch. 47, sec. 5 (C.); 24 Vict. ch. 110 (C.); 29 Vict. ch. 34 (C.); 32 Vict. ch. 45 (O.) which in sec. 41, substituted the word "medicine" for physic; 37 Vict. ch. 30 (O.); R.S.O. 1877, ch. 142, and contended that from the beginning to the present time there had been no statutory provision as to what ordinary medical practitioners were to study; that that was left to the medical men themselves, which indicated that by the practice of medicine was meant the application of drugs to the body. They cited: *Berry v. Henderson* (1870), L.R. 5 Q.B. 296.

*Nesbitt*, in reply, contended that the Act must be construed according to its present language, and that the practice of medicine included diagnosis. He also cited: *Apothecaries Co. v. Greenough* (1841), 1 Q.B. 799, 803.

November 21. Moss, C.J.O.:—Under the provisions of R.S.O. (1897), ch. 84, the Lieutenant-Governor-in-Council has referred to this Court for hearing or consideration the following question:—

"Ought it to be held upon the true interpretation of sec. 49 of the Ontario Medical Act, R.S.O. 1897, ch. 176, that a person not registered under that Act, undertaking or attempting for reward to cure or alleviate disease does not practise medicine within the meaning of that section, merely because the remedy advised, prescribed or administered by him does not involve the use or application of any drug or other substance which has or is supposed to have the property of curing or alleviating disease, that is to say, do the words 'to practise medicine' in the said section mean to attempt to cure or alleviate disease by the use of drugs, etc., or do they include cases in which the remedy or treatment advised, prescribed or administered does not involve the use of drugs or other substances which have or are supposed to have the property of curing or alleviating disease."

Before dealing with the question, it is necessary to consider shortly an objection raised to the power of the Lieutenant-Governor-in-Council to refer it. It is said that it is not within the scope of the authority to refer conferred by the Act, and that it is not within the competency of this Court under the Act to make answer to it.

The power of the Legislature to confer the most ample authority to refer to the Court questions of the widest and most extensive

C. A.  
1906  
IN RE  
ONTARIO  
MEDICAL  
ACT.

C. A.  
1906

IN RE  
ONTARIO  
MEDICAL  
ACT.

Moss, C.J.O.

character can scarcely be doubted. And that the exercise of such power has not been deemed incompatible with the working of responsible government is shewn by the fact that in the year 1833 the Imperial Parliament by the 3-4 William IV. ch. 41, sec. 4, empowered the Sovereign to refer to the Judicial Committee of the Privy Council "for hearing or consideration any such other matters whatsoever as His Majesty shall think fit"—a power which exists and has been acted upon up to the present day; and that when the Supreme Court of Canada was established in 1875, a similar power was conferred on the Governor-in-Council with respect to the Supreme Court: see R.S.C. 1886, ch. 135, sec. 37, amended by 54-55 Vict. ch. 25, sec. 4 (D.)

And legislation similar to R.S.O. 1897, ch. 84, has been enacted by the Legislatures of some of the other Provinces of Canada.

The only question can be, has the Legislature, by the Act in question, enabled the Lieutenant-Governor-in-Council to submit the question now before us.

The words of sec. 1 are very plain, and free from ambiguity. They are: "The Lieutenant-Governor-in-Council may refer to the Court of Appeal . . . any matter which he thinks fit to refer, and the Court shall thereupon hear or consider the same." There is no context to qualify or restrain the usual and ordinary signification of this language. There is nothing to control the ordinary grammatical meaning of the words used. It is true that the title of the Act is "An Act for expediting the decision of constitutional and other Provincial questions." The once apparently well settled rule that the title is not a part of the statute and ought not to be taken into consideration in construing it, seems not to be always strictly adhered to in recent times. The relaxation may be due to the modern practice of inserting in the statute a section enacting that it may be cited by some short title, in which case the section may be looked at as a good general description of all that was done by the Act: Wilberforce on Statutes, 2nd ed., p. 205. Here, however, there is no such section, and the words "other provincial questions," seem wide enough to include almost any manner of question. The Legislature was content to trust the Lieutenant-Governor-in-Council to exercise a proper and judicious discretion in availing himself of the authority given him. The limitations must come in that way or from legislative amendment of the



statute. In a case before the Judicial Committee a question as to the jurisdiction of the Committee under sec. 4 of 3-4 William IV., ch. 41, was raised, and their Lordships held that the only construction which could be placed on the words of the section was a construction which should give full and complete meaning to them without limitation. Speaking for the Committee, the Right Honourable Dr. Lushington said further, "Now these words have already been the subject of some discussion before the Judicial Committee, and I believe one or two attempts were made in the first instance to impose a limitation upon them; but the Judicial Committee were of opinion, though it did not come before the public, that they were not entitled to put any limitation upon these words, in any of the matters referred to them by the Crown. The same opinion is entertained by their Lordships upon the present occasion. . . . Their Lordships are of opinion that there is enough in this reference not merely to justify but absolutely to require them to proceed, because this is referred to them by an order-in-council; and the order-in-council which refers it to them, falls within the purview of the provisions of the statute 3-4 William IV. ch. 41, sec. 4, which enacts and prescribes what shall be their duty and in compliance with that duty they must entertain the prayer of this petition and hear it": *In re Schlumberger* (1853), 9 Mo. P.C. 1, at p. 12.

It is to be presumed that the Executive in the exercise of the authority vested in it by the Legislature will be careful to see that only such questions are referred as reasonably fall within the purview of the statute and as are reasonably proper to be heard or considered by a Court of law.

I am not one of those who are of the opinion that the Ontario Medical Act is an Act not passed in the public interest. That it is a public Act in the fullest sense and not a merely private Act is shewn by its inclusion in the Revised Statutes. Its early origin was due to an intelligent, wise and farsighted apprehension by the Legislature of the policy of protecting the public from the dangers and inconveniences arising from unskilful and unqualified persons assuming to practice as physicians and surgeons. The Legislature of that early day shewed its appreciation of the need of thorough education in medicine as in every other department of knowledge. Experience has proved that the means then adopted of requiring

C. A.

1906

IN RE  
ONTARIO  
MEDICAL  
ACT.

MOSS, C.J.O.



C. A.  
1906

IN RE  
ONTARIO  
MEDICAL  
ACT.

MOSS, C.J.O.

all persons desirous of so practising to submit to examination and obtain a license, were undoubtedly productive of benefit and advantage to the Province. They have since developed into the system of study, preparation and examination now provided for by R.S.O. 1897, ch. 176, and it cannot be doubted but that the public at large share very largely in the advantages derived from the presence in their midst of a body of learned and skilled practitioners. It is not merely by what has been and can be done in the cases of individual patients, but (as has been well said by a great modern physician) as much by what is accomplished in the way of protection of the public generally against disease and contagion that medicine proves itself a great science as well as a delicate craft.

And it cannot but be in the public interest to secure to the community the services of persons accredited as they must be under the Ontario Medical Act.

I think also that in placing a construction on the Act or the section in question, we are not to have regard only to the terms of the earlier Acts to the exclusion of the later, and to say that only what may have been understood as included in the term "prescribe for the sick" or "practice physic" or "practice medicine" at the time when they were first used in the legislation shall be included, and that all else shall be excluded.

By the terms of the Interpretation Act, sec. 8 (1), the law is to be considered as always speaking and whenever any matter or thing is expressed in the present tense the same is to be applied to the circumstances as they arise, so that effect may be given to each Act and every part thereof, according to its spirit, true intent and meaning.

And in placing a construction upon the part of the Act in question we are not to close our eyes to the great changes which have taken place in recent years in therapeutic methods. It is common knowledge that there has been a marked change, almost a revolution, in the position assigned to drugs as therapeutic agents. While they are not discarded, their use or application is by no means so extensive as formerly, and the well equipped practitioner of to-day seeks to study thoroughly and apply scientifically a few real medicines or healing agents, and does not feel under obligation to give any medicine in cases where in earlier times he would have con-

sidered any treatment that dispensed with it unscientific and improper.

Section 49 ought not to be read otherwise than in the light of considerations such as here suggested.

But when we come to consider the question referred many difficulties present themselves.

Much difficulty in dealing with it in a satisfactory manner is created by its nature and frame. No facts are stated. There is nothing but the bald question. It is to be borne in mind that in dealing with questions under the statute the Court is not exercising its ordinary appellate jurisdiction.

Dealing with the powers of the Supreme Court under sec. 37 of the Supreme Court Act referred to above, Taschereau, J., said: "Our answers are merely advisory, and we have to say what is the law as heretofore judicially expounded, not merely what is the law according to our opinion. We determine nothing. We are mere advisers, and the answers we give bind no one—not even ourselves:" *In re Provincial Fisheries* (1896), 26 S.C.R. 444, at p. 539.

The words "although advisory only," which occur in sub-sec. 6 of sec. 37 of R.S.C. ch. 135, as amended by 54-55 Vict. ch. 25, sec. 4, are not in our statute, but their insertion was scarcely necessary. All the other provisions of the statute go to shew that the opinion given is only for the information of the Lieutenant-Governor-in-Council. It is to be certified to him, and no judgment or report in open court is delivered. The same practice is observed in the Judicial Committee: *Safford & Wheeler's Privy Council Practice* p. 33, note (n). It is not a judgment appealable to the Supreme Court of Canada; so decided by that court in *Union Colliery Co. of British Columbia v. The Attorney-General of British Columbia* (1897), 27 S.C.R. 637, a case under a similar Act of the Legislature of British Columbia.

As I read the Act the Court is to be guided in giving its opinion by the settled decisions, and unless in the case of conflicting decisions it is not to pronounce whether they ought or ought not to have been decided as they were.

Therefore in considering the question regard must be had to the decided cases bearing upon it. Having regard to the way in which the second part of the question interprets the first part,

C. A.

1906

IN RE  
ONTARIO  
MEDICAL  
ACT.

Moss, C.J.O.

C. A.  
1906

IN RE  
ONTARIO  
MEDICAL  
ACT.

MOSS, C.J.O.

we are asked to put a legal interpretation on the words "to practice medicine" in sec. 49 of the Ontario Medical Act, which interpretation is to be applied to every possible kind of case that may arise. We are asked to say whether their meaning is to be confined to treatment of illness or disease by the use of drugs or similar therapeutic agents employed for the purpose of curing or alleviating illness or disease, or whether their meaning extends to include treatment which does not involve the use of drugs or similar therapeutic agents. The generality of the question prevents a categorical answer. It would not be possible even by attempting a process of exclusion to cover all cases that might arise. It is possible to say—because it has been so decided by a Court of competent jurisdiction—that the defendant in the case of *Regina v. Stewart*, in doing what he did in that instance, was not practising medicine. But unless there is a concrete case with the facts proved or known, how is it possible to say whether or not the words of sec. 49 are applicable? If the answer given was that if it were shewn that a person not registered under the Ontario Medical Act attempted to cure or alleviate disease by methods and courses of treatment known to medical science and adopted and used in their practice by medical practitioners registered under the Act, or that such person advised or prescribed treatment for disease or illness such as would be advised or prescribed by the registered practitioner, then although what was done, prescribed or administered did not involve the use or applicaiton of any drug or other substance having or supposed to have the property of curing or alleviating disease, he might be held to be practising medicine within the meaning of sec. 49, it would still leave the matter to be dealt with in a concrete case in which the ultimate decision must turn upon the facts found.

And yet as the case presents itself to me this is the only way in which the question is capable of being answered without, as I have said before, endeavouring by some process of exclusion to imagine and provide for all possible cases.

In the case of the Lord's Day Act of Ontario, I ventured to remark with reference to some of the questions there propounded, that to undertake to answer them would be to endeavour to give an exhaustive definition of "works of necessity," or to lay down a series of abstract propositions not having application to any particular case or set of circumstances, a thing dangerous to attempt



and if attempted likely to lead to embarrassing and possibly mischievous results when afterwards sought to be applied to actual cases: (1902) 1 O.W. R. 312, at p. 316.

When the same case was before the Judicial Committee of the Privy Council, Lord Chancellor Halsbury, referring to the questions other than the first, said: "They are questions proper to be considered in concrete cases only; and opinions expressed upon the operation of the sections referred to, and the extent to which they are applicable would be worthless for many reasons. They would be worthless as being speculative opinions on hypothetical questions. It would be contrary to principle, inconvenient, and inexpedient, that opinions should be given upon such questions at all. When they arise they must arise in concrete cases, involving private rights; and it would be extremely unwise for any judicial tribunal to attempt beforehand to exhaust all possible cases and facts which might occur to qualify, cut down, and override the operation of the particular words when the concrete case is not before it": *Attorney-General for Ontario v. The Hamilton Street R.W.Co.*, [1903] A.C. 529, at p. 529.

The question referred in the present instance is attended by the same difficulties, dangers and mischiefs. It does not permit of an unqualified affirmative or negative answer, and no other answer can be framed to meet all the possible cases and facts that might occur.

OSLER, J.A.:—The difficulty in the way of answering satisfactorily questions submitted under the Act for "expediting the decision of constitutional and other Provincial questions" has frequently been commented on by the Courts which have been invited—or ordered—to solve them. Generally, they are abstract questions, the answers to which must almost necessarily be of an academic or advisory character, and practically not binding upon the Court in a real litigation. I may refer to what I have said on this subject in *Re The Lord's Day Act of Ontario*, 1 O.W.R. 312, and other like cases, and to the observations of Lord Halsbury in delivering the opinion of the Judicial Committee in the same case [1903], A.C. 524, and to *The certificate of the Judges respecting a Courtmartial* (1760), 2 Eden. 371, App.

The question now proposed does not admit of an answer covering

C. A.

1906

IN RE  
ONTARIO  
MEDICAL  
ACT.

Moss, C.J.O.



C. A.

1906

IN RE  
ONTARIO  
MEDICAL  
ACT.

Osler, J.A.

definitely and categorically all cases which may arise under sec. 49 of the Ontario Medical Act, R.S.O. 1897, ch. 176. To practise medicine has long since ceased to convey the idea that it is confined to the administration of drugs, nor do I agree that this expression in the Medical Act is limited to so bald a meaning. To hold that it is would be to refuse to recognize that the thoughts of men in the most liberal of all the learned professions have been widened in the past half century, and to affirm that legislation has gone backward instead of keeping pace with the knowledge of the times.

Nevertheless, we cannot say that the profession, wide as have been its conquests and extended the scope of its practice, has taken all knowledge of the art of healing for its province, and therefore the question submitted (in its alternative form) does not admit of an universal answer in the affirmative. We can only say that the words "to practise medicine" may include cases in which the remedy prescribed, etc., does not involve the use of drugs or other substances. Every case must be determined upon its own facts and circumstances. We cannot lay down a rule or formulate an answer which will include all.

I ought to add that I regard the Medical Act as one passed, as its predecessors have been from a very early period, mainly in the interest of the public, and not for the purpose of creating a close professional corporation.

The observations addressed to us during the argument founded on the latter assumption, as if the present proceedings had been promoted, as certain rules of equity are said to have arisen, less from a spirit of piety—*sc.*, public policy—than the love of fees, seem hardly warranted.

GARROW, J.A.:—Reference to this Court under the provisions of R.S.O. 1897, ch. 84, of the following question: [setting it out].

R.S.O. 1897, ch. 84, is entitled "An Act for expediting the decision of constitutional and other Provincial questions;" and although sec. 1 provides that the Lieutenant-Governor-in-Council may refer "any matter which he thinks fit to refer," the "any matter" ought I think to be construed as meaning any matter of a constitutional or Provincial nature.

The question submitted is certainly not constitutional, and I doubt if it can be properly called "Provincial" in the sense in which

in my opinion that somewhat vague term is used in the statute. Otherwise there is nothing to prevent a similar submission in any case, however trivial, involving the construction of a Provincial statute. This would of course be objectionable, and would speedily bring the statute into disrepute. However, as my doubt is addressed more to the policy of submitting than to the strict power to submit, I will proceed to answer the question as best I can.

Before doing so, however, there are one or two preliminary matters which should perhaps be looked at.

First. What is the general meaning and purpose of the statute R.S.O. 1897, ch. 176? Was its prime object, as contended by counsel for the Medical Association, the protection of the public against quackery in medicine, or was it the perhaps no less laudable and entirely proper one of organizing and protecting the profession? And the proper answer to these queries has, I think, a distinct bearing on the proper answer to be made to the question we are asked.

The Act is entitled "An Act respecting the Profession of Medicine and Surgery." Its history, in one form or other, goes back for many years, and sec. 49, the section in question, has had substantially its present form since at least the year 1874, 37 Vict. ch. 30 (O.), sec. 40, except that the prohibition there is against practising "physic," etc., an unimportant difference, in my opinion. And the plain object of the statute in its various evolutions and developments was, I think, to organize the profession of medicine, and to create an examining and licensing body, and to prohibit the unlicensed from practising in competition with the licensed, and whatever protection the public receives comes incidentally, from presumably having under the statute a learned body of practitioners who have passed the necessary examinations before being admitted to practise, upon whom to call when required.

If the interests of the public had been the main consideration, as contended, the prohibition would scarcely have been confined to practising for hire, gain, or hope of reward, and some exception might in that case have been expected in the case of a practitioner with undoubted learning and skill, such for instance as an eminent physician from a foreign country or Province. And one might also expect to find in that case a prohibition against the universal

C. A.

1906

---

IN RE  
ONTARIO  
MEDICAL  
ACT.

---

Garrow, J.A.

C. A.  
1906

IN RE  
ONTARIO  
MEDICAL  
ACT.

Garrow, J.A.

and no doubt harmful prescribing by means of advertisements of all sorts of mixtures for all sorts of diseases.

Considerations such as these have led me to the conclusion that the prime object of the section in question is the protection of the monopoly of practising, and not the protection of the public against the quacks or unregistered.

My next general remark is that in my opinion we are bound in answering the question to regard the decisions already given upon the construction of the section in question. The decisions so given, so far as they go, for they have probably not covered the whole ground, establish the law upon the subject, and cannot be reviewed by us as if this was an appeal from them or any of them. If the law as so declared is wrong, or if from any cause they are unsatisfactory, the proper forum for their reconsideration is, of course, the Legislature, where all parties are presumably represented and can be properly heard and complete justice done.

Coming now to the question as submitted. "Practising medicine" is not a definite and finally established term. There is much room for argument both as to what should be called "medicine," and as to what should be called "practising."

And for these reasons the question, which must always depend for its proper and complete answer upon the facts as well as the law, is, in my opinion, incapable of a satisfactory or categorical answer, "yes" or "no," upon the material before us.

The nearest I can come to it is this: The term "practising medicine" need not and does not, in my opinion, necessarily involve only the prescribing or administering of a drug or other medicinal substance, but may well include all such means and methods of treatment or prevention of disease as are from time to time generally taught in the medical colleges and practised by the regular or registered practitioner.

The statute intends, I think, as I have said, to protect him in the monopoly of practising his profession, and not merely to protect him in the prescribing and administration of drugs.

The medical practice changes as scientific knowledge broadens.

When these words were first used in the statutes it is probable that the main reliance of the profession was upon treatment by means of drugs. But it is, I think, common knowledge that drug treatment has at least diminished in modern practice, and that



greater attention is being paid to other methods, either in addition to drug treatment or in substitution for it, such as food, drink, regulated exercise, fresh air, bathing and other uses of water, electricity in its various forms, massage, etc. And in my opinion the words "practising medicine" may under certain circumstances include these and similar methods of treatment of disease, actual or threatened, as well as the mere administration of drugs.

The difficulty, however, is in the practical application of the prohibition to the other methods.

The thing practised must, to be illegal, be an invasion of similar things taught and practised by the regular practitioner, otherwise it does not affect his monopoly, and is outside the statute. And it must be practised as the regular practitioner would do it—that is, for gain, and after diagnosis and advice. And it must be more than a mere isolated instance, which is insufficient to prove a "practice:" see *Apothecaries Co. v. Jones* [1893], 1 Q.B. 89.

A patient may always do his own diagnosing and buy and use what he chooses (except certain poisons) upon himself: see *Regina v. Howarth*, 24 O.R. 561. In giving judgment in that case, Rose, J., with whom Galt, C.J., concurred, said at p. 567: "If one went to a chemist and druggist and told him he had some particular complaint, and asked the druggist if he had some medicine compounded for such complaint or ailment, and purchased the medicine on the advice of the chemist, that would not be practising medicine. . . . I think a chemist and druggist may sell drugs or the compounds which he has, by telling intending purchasers their qualities and properties, and commend his goods as being fit for the purposes for which they are intended, and he may tell which is the better or best of those he is selling. If the purchaser takes upon himself the responsibility of determining the symptoms of his own case, and judging from such symptoms what trouble he is suffering from and the medicine he requires to relieve him from such suffering, he is not asking the chemist and druggist to advise him as to his ailments or troubles; nor is he asking him to perform the duties he might call upon his physician to do."

See also *Regina v. Coulson*, 27 O.R. 59, before the same Divisional Court, but differently constituted.

And if the patient may legally go to the druggist under such circumstances, he ought reasonably to be held to be at liberty to

C. A

1906

IN RE  
ONTARIO  
MEDICAL  
ACT.

Garrow, J.A.



C. A

1906

IN RE  
ONTARIO  
MEDICAL  
ACT.

Garrow, J.A.

go to the Christian Scientist, the osteopath, the medical electrician, the masseur, etc., and request, obtain and pay for the treatment which these persons give, so long as he does his own diagnosing and prescribing. This is simply to say in another form that the patient may, as he always, so far as I know, might, be his own doctor, just as he may, however unwisely in both cases, be his own lawyer.

See as illustrative cases: *Regina v. Stewart*, 17 O.R. 4; *Queen v. Valleau*, 3 Can. C.C. 435.

The latter (against a masseur), although not as authoritative as the former, is the well reasoned judgment of an able and experienced county court Judge.

MACLAREN, J.A.:—We were asked on behalf of the Medical Council to review the cases in our courts bearing upon the question asked, from *Regina v. Hall*, 8 O.R. 407, to *Regina v. Coulson*, 27 O.R. 59, and to say whether they were correct; and we were urged particularly to say that *Regina v. Stewart*, 17 O.R. 4, was not good law. I do not think we can properly undertake such a task; we will probably find difficulty enough in answering the double question which has been submitted to us by the order-in-council. From the comprehensive nature of the subject, it seems almost impossible to give a categorical answer that will serve the purpose desired, and it is precisely one of those matters that would be more satisfactorily disposed of if a concrete case were brought before us, as each case must necessarily depend very largely upon its own facts. However, as the question has been submitted to us by the proper authority, and may be said to be a Provincial question, as it is a subject or matter clearly within the Provincial jurisdiction and asks for an interpretation of a Provincial statute directly affecting a large class of citizens and indirectly affecting the whole community, I consider it to be our duty to answer it as best we can.

The part of sec. 49 of R.S.O. 1897, ch. 176, which we are asked to interpret has been on our statute book substantially in its present form for nearly a century. In the first Act, 55 Geo. III. ch. 10, the term used was to "practise physick." This phrase was used up to the Act of 1869, 32 Vict. ch. 45, when the words used were "practise medicine." In the Act of 1874, 37 Vict. ch. 30, the old words were restored, but in the revision of 1877, ch. 142, the words

"practise medicine" were substituted, and these have been retained in the revisions of 1887 and 1897. I think the words have been used interchangeably and as synonymous, although "physic" may be more suggestive of the use of drugs, probably because they were formerly prescribed more freely than at present.

It is well known that the practice of medicine has changed wonderfully since our first statute was passed in 1815, so that the practical application or effect may have varied during these years. I think we should endeavour to ascertain what was the fair meaning of the words "to practise medicine" when they were last enacted by the Legislature. In my opinion they were used in their usual or popular signification.

The best definition of the word "medicine" that I have been able to find is that in Murray's New Oxford Dictionary. The first meaning there given to it reads as follows: "That department of knowledge and practice which is concerned with the cure, alleviation, and prevention of disease in human beings, and with the restoration and preservation of health. Also, in a more restricted sense, applied to that branch of this department which is the province of the physician, in the modern application of the term; the art of restoring and preserving the health of human beings by the administration of remedial substances and the regulation of diet, habits, and conditions of life." The practice of medicine would be the practice of the art set out in the foregoing definition, especially in the latter part.

Diagnosis and the giving of advice are usually important elements. This appears in the oldest case to which we have been referred, No. 62 in 6 Mod. 44 (1703). Rose the apothecary, who was convicted in the Queen's Bench of practising physic, obtained a reversal of the judgment in the House of Lords, as would appear from the report, largely on the argument that he had not given advice: 5 Brown P.C. 553.

This view is, in my opinion, strengthened by some words which follow those we are asked to interpret in sec. 49 of R.S.O. ch. 176. I refer to the fact that it is made an offence for an unregistered person to "advertise to give advice in medicine." It is true that we are not asked to interpret these latter words, but the connection in which they are found aid in determining what was in the mind of the Legislature.

C. A.

1906

IN RE  
ONTARIO  
MEDICAL  
ACT.

Maclaren, J.A.

C. A.

1906

IN RE  
ONTARIO  
MEDICAL  
ACT.

Maclaren, J.A.

Not only have the changes which have taken place in the practice of medicine a bearing upon the subject, but also the minute specialization which has gone on increasingly of late years. Many things might be a practising of medicine to-day that could not have been properly so described some years ago. This is an additional reason why it is difficult for the Court to give a comprehensive definition, as some of these matters could only be determined by satisfactory evidence.

If, however, the question submitted to us is to be categorically answered, and the word "substances" is to be interpreted as something of the same nature as "drugs" on the rule of *ejusdem generis*, I would have no hesitation in giving a negative answer to the first part of the question and an affirmative answer to the latter part of the question as to the possibility of the words "to practise medicine" including cases where drugs, etc., may not be prescribed or administered.

MEREDITH, J.A.:—This case is not one of an appeal to the ordinary jurisdiction of this Court, but purports to be a matter referred to the Court for consideration under the extraordinary power conferred upon the Lieutenant-Governor-in-Council of this Province by ch. 84 of the Revised Statutes of Ontario, 1897. Our first duty, therefore, is to ascertain what, if any, jurisdiction the Court has in the matter. Much care should be taken by every Court against usurping any jurisdiction it has not.

The question referred is really whether the case of *Regina v. Stewart*, 17 O.R. 4, was rightly decided; and that question is raised solely at the instance, and in the interests, of "the medical profession of Ontario," "under the name and style of the College of Physicians and Surgeons of Ontario." The Province is not directly interested in, and did not present, the case; nor indeed was it at all represented on the argument of it. Is such a case within the provisions of the before-mentioned enactment?

The words of the Act are very broad: "May refer . . . any matter which he thinks fit to refer;" but obviously all that the broadest meaning of the words might cover cannot be meant. They cannot be meant to include such questions, for instance, as "whether the moon is made of green cheese," or whether the House of Lords ought to be "mended or ended," and they must be

controlled by common sense and the general provisions of the enactment. The Act must, in my opinion, be restricted to (1) legal questions; (2) respecting matters within the jurisdiction of the Court; and (3) of Provincial concern.

It is hardly necessary to say anything regarding the first requisite. This is a court of law only, not a college of universal instruction or knowledge; and its "opinion" is to be given, and is to "be deemed a judgment of the Court," subject to appeal, "as in the case of a judgment in an action."

That it must be a matter within the jurisdiction of the Court seems to me quite, if not equally, plain. Legislation alone has conferred all the powers which this Court possesses; it has no inherited or inherent jurisdiction or power: except those conferred by statute none can be exercised. It can hardly be that this statute-bounded existence can be enlarged to one of unlimited power at the will of the Lieutenant-Governor-in-Council. The Acts must all be read, and the power under this enactment fitted in with those respecting the constitution of the Court and conferring jurisdiction upon it. Can the Lieutenant-Governor-in-Council refer the question whether the judgment of the Supreme Court of Canada in one case, or that of the Judicial Committee of His Majesty's Privy Council in another, was right? Certainly not; and because they are matters beyond the jurisdiction of this Court. Can he any more refer this question if it has been decided by a Court of last resort in this Province, and one over which, in such a case, this Court would have no jurisdiction of any sort?

It was said that no appeal would lie from a judgment such as that in *Regina v. Stewart*; that the Divisional Court was the court of last resort in this Province in such a case; and that it was because no appeal would lie that the order-in-council in question was made; and that seems very likely; for why not leave the parties to the ordinary course of procedure if the case could be brought to this Court by such means? If no such appeal could be had, if the Divisional Court be really the court of last resort in this Province, then there was, in my opinion, no power to refer the case; whilst if that were all a mistake, the order-in-council was improvidently made under it.

The point was not argued, it was taken for granted, that such a case as *Regina v. Stewart* was, could not now be carried beyond

C. A.

1906

IN RE  
ONTARIO  
MEDICAL  
ACT.

Meredith, J.A.



C. A.  
1906

IN RE  
ONTARIO  
MEDICAL  
ACT.

Meredith, J.A.

a Divisional Court; but I am at present unable quite to see how that can be. Leave may be necessary in cases in which the Divisional Court is unanimous, but if the facts of any case bring it within any of the provisions of the Judicature Act as amended by 4 Edw. VII. ch. 11, (O.), giving an appeal by leave, are they not applicable? Chapter 91 of the Revised Statutes of Ontario, 1897, giving an appeal to this Court in such cases, but only where the decision, in the certified opinion of the Attorney-General of Canada, or for Ontario, involves a question on the construction of the British North America Act, and is of sufficient importance to justify the appeal, looks the other way to some extent, but is not at all inconsistent with a like appeal by leave, such as the Judicature Act now requires. But this enactment also makes against the right to refer the matter to this Court, for it would be inconsistent, in one chapter, to permit an appeal in such a case only when a constitutional question of importance was involved, and, in another give power to refer any case, no matter how unimportant, practically giving an appeal, in every case of the kind, upon an order-in-council.

That the matter must not be merely one between ordinary litigants which may and should be litigated in the ordinary way, but must be one of a Provincial character, appears from the title to the Act: "An Act for expediting the decision of constitutional and other Provincial questions," and from its very nature and through its provisions, including the entire absence of any reference to that generally considered important question—costs. If A. and B. had litigated any question concerning their private or corporate rights or interests, no one would contend that under the Act there could properly be a reference to this Court of the question whether the matters in question in such litigation had been rightly decided. The whole enactment must be considered on the question of its general scope and effect.

My conclusion on the question of jurisdiction, therefore, is (1) that there was no power to refer the matter in question, because it was one without the jurisdiction of this Court, or else that the order referring it was improvidently made under the mistake that the question could not be brought up to this Court through the ordinary channels; and (2) that there was no power to refer it, because it is not a Provincial question, but one raised and referred

wholly at the instance, and for the benefit, of the Ontario College of Physicians and Surgeons.

But as a majority of this Court is of a different opinion, it becomes necessary to answer the question; and in my opinion it should be answered in accordance with the judgment of the Divisional Court in the case of *Regina v. Stewart*:—(1) because it was so decided nearly 18 years ago, and that decision has ever since been deemed to have, and has been treated as having, settled the law upon the subject, and hundreds if not thousands of reputable persons have established themselves in business on the faith of it and under its protection, and the Legislature, not slow to speak when its words have been misinterpreted, has given to it the assent of 18 years' silence—if there can be legislative assent by silence; and (2) because that case was rightly decided. In my opinion the word "medicine," thrice used in the section in question—sec. 49 of the Ontario Medical Act—should be given its primary and popular meaning and not the very far-reaching interpretation the College contends for. If it mean the art or science of preserving and restoring health, in the sense of wholeness or soundness of body and mind, it would include the art of surgery, for a broken limb is unsoundness just as much as disease, and would make the use of that word unnecessary and improper; so too, though not altogether so plainly, the use of the word midwifery, which really is the art of preserving the health of mother and child in child-birth. Some meaning ought to be given to each word, they should not be treated as a case of tautology; and the best method of so doing is to give to each its popular—its generally understood—meaning.

So treating them, each of the three words has its distinct place: medicine, any substance used for the prevention, healing or alleviation of disease; surgery, the art of healing or alleviating disease or injuries of the body by manual operation; and midwifery, the art of assisting women in child-birth. To most minds the words "practise medicine" would mean practise the art of healing the sick by means of medicines or drugs; and practise surgery would mean the healing of injuries and diseases by surgical operations; and such was, speaking generally, in my opinion, the meaning of the legislation. If not, if the very widest meaning is to be given to each word, the dentist, the chiropodist, the manicurist, and even the barber, frequently brings himself within the penalty of the

C. A.

1906

IN RE  
ONTARIO  
MEDICAL  
ACT.

Meredith, J.A

C. A.

1906

IN RE  
ONTARIO  
MEDICAL  
ACT.

Meredith, J. A.

section. The section was not intended to have such a far-reaching effect. Every member of the medical profession is, or is supposed, and ought, to be skilled in the use of drugs or medicaments—generally called medicines—and uses them in his practice; to the ordinary patient it is generally, if not always, a treatment of drugs; that, in some cases, patients may not be given drugs—may be required to abstain from all sorts of drugs—does not alter the general rule, nor do away with the fact that the practice of medicine by members of the medical profession is largely a practice in drugs. It therefore seems difficult to say that one who has nothing to do with drugs, or one who reprobates their use in sickness and in health, one who would not throw physic even to the dogs, practices medicine. Or that the laying on of hands, whether in a devout manner, or after the more robust fashion of the “osteopathist,” or of the “masseur,” is practising medicine. That is really more like practising surgery; but no question as to that is asked. Or that the healing of the sick by faith alone is an infraction of the Act.

If the larger meaning is to be given to the word “medicine,” that must now be done by legislation, not by adjudication, or by way of opinion under the Act for expediting the decision of constitutional and other Provincial questions. And if the public, and not merely the medical profession, need protection against “Christian Science,” “osteopathy,” massage, or any other “cure,” it might be better not to limit the penalties to those who practise for hire, gain, or hope of reward, but extend it to all who do the wrong, for wrong it then would be just as much without as with a fee.

I should, perhaps, add, that I am unable to accept the testimony of those who assert, that there has been a mighty change in the knowledge and practice of the arts of healing since the medical profession first obtained class protection in this Province. A reference to medical works, published long before that, shew as keen an appreciation of the benefits of what are frequently called hygienic methods, as is shewn in present day publications and practices: and it is confidently asserted, by those who ought to know far better than any of us, that the practice of massage is at least as old as the Pyramids of the Nile. A closer investigation will, I doubt not, discover that, even in regard to the healing arts, there is some truth in the saying of ancient authority that there is nothing new under the sun.



## [IN THE COURT OF APPEAL.]

GIBSON V. GARDNER.

C. A.

1906

*Executors and Administrators—Passing of Accounts—High Court—Reference to Take Accounts in Master's Office—Prior Account in Surrogate Court—Effect of—Consent Judgment—Trustees—R.S.O. 1897, ch. 59, sec. 52; 63 Vict. ch. 17, sec. 18 (O); 5 Edw. VII. ch. 14 (O)—Con. Rules 666, 667.*

Feb. 10.  
Mar. 23.  
Nov. 3.

By sec. 72 of the Surrogate Courts Act, R.S.O. 1897, ch. 59, "Where an executor or administrator has filed in the proper surrogate court an account of his dealings with the estate of which he is executor or administrator, and the Judge has approved thereof in whole or in part, if the executor or administrator is subsequently required to pass his accounts in the High Court, such approval, except in so far as fraud or mistake is shewn, shall be binding upon any person who was notified of the proceeding taken before the surrogate Judge, or who was present or represented therein, and upon every one claiming under such person."

The defendant, an executor brought into the proper surrogate court the accounts of certain estates of which he was the executor, which were passed by the Judge, in the presence of the solicitor for the plaintiff, a beneficiary. Subsequently the plaintiff brought an action in the High Court, and without any pleadings being delivered, an order was made, by consent, for the removal of the executor and the appointment of a trust company in his place, and for the passing of the accounts, adopting the common form of the order for such purpose:—

*Held*, that on the taking of the accounts in the Master's office the account taken and passed by the surrogate court Judge was under sec. 72, no mistake or fraud having been shewn, binding on the plaintiff, for notwithstanding such consent the judgment must be construed as if made *in invitum*, and the usual rules of law and procedure, statutory and otherwise, applied thereto.

63 Vict. ch. 17, sec. 18 (O), 5 Edw. VII. ch. 14 (O) and Con. Rules 666 and 667 referred to as to the powers and duties of the Master in taking accounts, sec. 72 applying to trustees as well as executors.

THIS was an appeal from the order of Boyd, C., dismissing the appeal by the plaintiff from the ruling of the Master-in-Ordinary in the course of a reference under a consent judgment to take the accounts of the defendant Gardner as executor and trustee. The Master certified that he had adopted the result of an accounting before the Judge of the surrogate court of the county of Hastings up to the time of such accounting.

Samuel Barton Burdett, who died on 20th January, 1892, by his last will and testament devised and bequeathed all his real and personal estate that he might die seised or possessed of to his sister Mehala Jane Burdett, with directions to divide the same into two equal parts, one of which should belong to her absolutely; the other half or part she should deposit in the Bank of Montreal to



C. A.  
1906  
GIBSON  
v.  
GARDNER.

her own credit, and pay the interest, as it accrued due, to testator's daughter Mabel Burdett. In case his sister died without disposing of the estate, it should be administered by the Court of Chancery, and one-half should be administered by the Court, and the interest paid to the said daughter Mabel, and the other half to the testator's brother Henry D. Burdett in trust to pay the income to his children, and the children of testator's brother William T. Burdett; and he appointed the said Mehala Jane Burdett residuary legatee and sole executrix of his will.

The will was duly proved by Mehala Jane Burdett, who took upon herself the administration thereof.

Mehala Jane Burdett died on the 10th April, 1895, having by her will directed and willed, devised and bequeathed that all and every interest and benefit, portion and property, which was given to her, or which she received under and by virtue of the will of her said brother Samuel Barton Burdett, should be administered by the Chancery Division of the High Court of Justice for Ontario, and invested by the said Court, and the interest, as it accrued thereon annually, should go and be paid to her niece Mabel Burdett during her lifetime, and after her death to her issue, share and share alike absolutely; but if the said Mabel Burdett died without issue, then she willed and directed that all of said property, which she had received as aforesaid, be given by the said Court, or her executor thereafter appointed, to and divided equally between her two brothers the said Henry D. Burdett and William T. Burdett; and that all other property which she might die possessed of or entitled to, other than what she received as aforesaid, should also be divided equally between her two brothers by her executor; and she appointed the defendant Samuel A. Gardner the executor of her said will.

On 31st January, 1901, in pursuance of an order made by the surrogate Judge of the county of Hastings, the accounts of the said Samuel A. Gardner in connection with both of the said estates, were taken and passed by the surrogate court of the said county, in the presence of the solicitors for the plaintiff and defendant Gardner, and the solicitor for the Provincial Treasurer; but an infant daughter of the plaintiff, Vera Burdett Gibson, was not represented.

On 26th September, 1905, an action was brought by the said

Mabel Burdett, now Mabel Gibson, against the said Samuel A. Gardner, and the said Vera Burdett Gibson.

C. A.  
1906

GIBSON  
v.  
GARDNER.

The claim in the writ was for the removal of the defendant Samuel A. Gardner from his position of executor under the will of the said Mehala Jane Burdett and of the will Samuel Barton Burdett, and for the appointment of a trustee in his place, and to have the accounts of his executorship taken.

On November 22nd, 1905, an order was made by Anglin, J., by consent, appointing the Toronto General Trusts Corporation trustee of both estates, and directing that an account be taken of the personal estate of the said testator Samuel Barton Burdett that came to the hands of the said Mehala Jane Burdett, deceased, or of the defendant Gardner, or which but for their wilful neglect or default might have been received, and a like account of the personal estate of the said Mehala Jane Burdett, deceased, which came to the hands of the said defendant Gardner or which but for his wilful neglect or default might have been received, with the right of the said defendant Gardner to claim and set up any right he might be advised he was entitled to against the plaintiff with regard to the said estates.

Upon the matter coming before the Master-in-Ordinary, he ruled that the plaintiff was under sec. 72 of the Surrogate Courts Act, R.S.O. 1897, ch. 59, bound by the account taken in the said surrogate court, but as the said infant Vera Gibson was not then represented, she was not bound thereby, and he certified accordingly.

The judgment of the Master was as follows:—

February 10, 1906. THE MASTER IN ORDINARY:—The general rules prescribing the jurisdiction of the Master's Office as to taking accounts on references, have for over half a century provided that in taking the accounts and making the inquiries referred to in the Rules, it shall not be necessary that any of the matters therein mentioned shall have been stated in the pleadings, or that the evidence thereof shall have been given before the judgment or order of reference, or that the judgment or order shall contain any specific direction in respect thereof; Ch. Order (1853). No. 42, sec. 13, now Con. Rule 666. And in the next Rule, it is provided that under a judgment or order of reference the Master

C. A.  
1906

GIBSON  
v.  
GARDNER.

Master in  
Ordinary.

shall have power, among other powers generally, in taking the accounts, to inquire, adjudge and report as to all matters relating thereto as fully as if the same had been specially referred. (Con. Rule 667.)

In *Sculthorpe v. Burn* (1866), 12 Gr. 427, it was held that by the original General Order of 1853, the Master had been given a greater discretion as to the conduct of references before him than that given to the Masters of the English Court of Chancery. And in *Carpenter v. Wood* (1863), 10 Gr. 354, it was held that the general order applied to all cases where accounts were directed to be taken before the Master. Spragge, V.C., refused to repeat in the decree the sections in the order directing an inquiry as to wilful neglect and default, saying: "The scope of the section, as expressed in the beginning of it, is as general as it could be made. 'In the taking of accounts in the Master's office' I think it embraces every kind of account referred to the Master."

In *Edinburgh Life Assurance Co. v. Allen* (1876), 23 Gr. 230, the head note states that "a stated account set up in the answer may be insisted upon in the Master's office, although no evidence was given of it at the hearing; being a matter of account which under the General Orders, the Master has a right to investigate without special reference." But in his judgment Proudfoot, J., went further and said: (239) "The defendant, I apprehend, need not have set up such a defence by answer, nor need an inquiry have been given him. He had a right under the general order to rely for the first time upon it in the Master's Office."

*Taylor v. Magrath* (1885), 10 O.R. 669, was an action for an account in which a consent judgment had been made referring it generally to the Master to take an account of the dealings of the defendant as trustee of certain property. In taking the accounts the plaintiff brought in an account, which had been rendered by the defendant, but his executors (he having died during the proceedings) sought to change the form of account; but it was held by the Master, and in appeal by Boyd, C., that the rendered account was binding upon the executors.

In this case there is also a consent judgment, and it is contended on behalf of the plaintiff that by reason of such consent judgment the provisions of sec. 72 of the Surrogate Courts Act, R.S.O. 1897, ch. 59, cannot be invoked by the defendant in respect of his accounts

as executor passed and approved by the surrogate court of the county of Hastings on the 31st January, 1901, which section reads as follows: "When an executor or administrator has filed in the proper surrogate court an account of his dealings with the estate of which he is executor or administrator, and the Judge has approved thereof in whole or in part, if the executor or administrator is subsequently required to pass his accounts in the High Court, such approval, except so far as mistake or fraud is shewn, shall be binding upon any person who was notified of the proceedings taken before the surrogate Judge, or who was present or represented thereat, and upon every one claiming under such person."

The effect of this section is to limit the jurisdiction of the High Court in taking and passing executor's accounts; and being worded: "shall be binding," must be classed as an imperative enactment, and also, I think must be held to be incorporated into the consent judgment and therefore limiting the jurisdiction of the Court in taking the accounts referred.

The order of the surrogate court of the county of Hastings, dated the 31st January, 1901, recited that the defendant executor's accounts were passed in the presence of the solicitor for the present plaintiff and of the solicitors for the other parties named in the order; and I must therefore give effect to the statutory mandate and hold that the approval of the defendant executor's accounts of his dealings with the estate of which he is the executor, given in the presence of the solicitor representing the plaintiff and set out in the order of the surrogate Judge, dated the 31st January, 1901, is binding on the said plaintiff in these proceedings in the High Court.

The statute gives effect to the old maxim of law: "*Nemo debet bis vexari pro unâ et eâdem causâ*;" and the proceedings in the surrogate court and in this court are for "the same cause of action," namely, the accounting by the defendant executor of his dealings with the estate mentioned in the order. It has been well said by Lord Kenyon, C.J., that "if an action be brought and the merits of the question be discussed between the parties and a final judgment obtained by either, the parties are concluded and cannot canvass the same in another action."

As it appears that all the facts now brought forward existed at the time of the former rule, and every objection which can now

C. A.

1906

GIBSON  
v. <sup>Holden</sup>  
GARDNER.

Master in  
Ordinary.



C.A.  
1906  
GIBSON  
v.  
GARDNER.  
Master in  
Ordinary.

be urged might then have been brought forward, the matter must now be taken to have passed *in rem judicatam* and the former decision is conclusive between the parties: *Greathead v. Bromley* (1798), 7 T.R. 456.

But as the infant defendant was not a party to, nor represented in, the proceedings in the surrogate court, she is not affected by the proceedings, nor by the accounts approved of and passed by the surrogate court of the county of Hastings.

From this there was an appeal to a Judge sitting in the Weekly Court.

On March 22nd, 1906, the appeal was heard before BOYD, C. *F. Arnoldi*, K.C., for the plaintiff.

*A. H. Marsh*, K.C. for the defendant Gardner.

*F. W. Harcourt*, for the defendant Vera Burdett Gibson, an infant.

March 23. BOYD, C.:—The settled practice appears now to be in England, as it has long been established here under the General Orders (now Con. Rules 665, 666, 667), that under a judgment or order to account the Master may inquire into, adjudge and report upon settled accounts—and this whether the judgment is by consent or otherwise, and whether the matter be referred to in the pleadings or not. That convenient practice, recognized in *Newen v. Wetten* (1862), 31 Beav. 315, is firmly grounded by the Court of Appeal in *Holgate v. Shutt* (1884), 27 Ch.D. 111 and 28 Ch.D. 111; (and it has been so laid down in the case cited by the Master): *Edinburgh Life Assurance Co. v. Allen* (1876), 23 Gr. 230, which has been followed without question ever since.

But it is said that this prior investigation of the estate accounts before the surrogate Judge of the locality is not a matter of settled or stated account, but is rather to be treated as *res judicata*, which should be set up in the pleadings. R.S.O. 1897, ch. 59, sec. 72, is that the account of the dealing of the executor with the estate being filed and approved of by the Judge, shall be binding upon any person notified and attending on the proceedings in any subsequent investigation of the account in the High Court—except in so far as mistake or fraud is shewn in the account so approved.

This investigation is substantially an auditing of the accounts, and it was so treated in *Re Russell* (1904), 8 O.L.R. 481, 3 O.W.R. 926. It is just the sort of examination and approval of accounts that was dealt with in the English case cited in 27 and 28 Ch.D., where the audit was by an officer appointed under the rules of a benefit society. . . .

The appeal is dismissed with costs.

From this judgment there was an appeal by the plaintiff to the Court of Appeal.

On September 24, 1906, the appeal was heard before Moss, C.J.O., OSLER, GARROW, MACLAREN and MEREDITH, JJ.A.

*F. Arnoldi*, K.C., for the appellant. The account taken in the surrogate court cannot be deemed to be a settled account: *Barrs v. Jackson* (1842), 1 Y. & C. 585. It can only be of force on the principle of *res judicata*. If *res judicata* is relied on it must be pleaded. No such plea has been pleaded here, but the defendant submitted to judgment for an account in which the whole matter was open: *Dundas v. Waddell* (1880), 5 App. Cas. 249; *Langmeade v. Maple* (1865), 18 C.B.N.S. 255, 270; *Hunter v. Stewart* (1862), 31 L.J.N.S. Ch. 346; *Everest & Strode on Estoppel* (1884), 67. The surrogate court could not deal with the matter, as it had not the proper parties and material before it. Then, under the will of Samuel Barton Burdett, the Court of Chancery is specially appointed as the forum in which the accounts should be taken, and therefore the defendant Gardner should have administered the estates in the High Court: The account taken in the surrogate was therefore a nullity. The judgment in this action was by consent, and directs the account to be taken without any qualification. The Master was therefore bound by the judgment, and erred in not obeying same: Article in *Can. Law Journal* (1896), 32 C.L.J.N.S. 90 where the cases are collected. The debts of the estates were paid long before the order of the surrogate court was made, so that the defendant's executorship was at an end, and there was no jurisdiction in the surrogate court to deal with the matter.

*A. H. Marsh*, K.C., for the respondent. The question of *res judicata* does not arise. The question is purely one of settled

C. A.  
1906

GIBSON  
v.  
GARDNER.  
Boyd, C.

C. A.  
 1906  
 GIBSON  
 v.  
 GARDNER.

account. To give the surrogate court jurisdiction to deal with the matter it was not essential that all parties interested should be before the court. All that it is necessary to shew is that the appellant was represented, and moreover she did not appeal from the order, but acquiesced in it. She is therefore bound by it except in so far as mistake or error may be shewn. The defendant had not ceased to be executor when the accounts were taken in the surrogate court. An executor does not cease to be such until all debts and legacies have been satisfied and the surplus invested in the trusts of the will: *Cumming v. Landed Banking and Loan Co.* (1890), 20 O.R. 384, (1893), 22 S.C.R. 246, 250; *Dover v. Denne* (1902), 3 O.L.R. 664, 689. The defendant is treated by the plaintiff as executor, for he has been sued by her as such. Section 72 applies to trustees as well as executors, for by sec. 18 of 63 Vict. ch. 16 (O.), sec. 72 is expressly made applicable to trustees. This Act was assented to on 30th April, 1900, while the order of the surrogate Judge was not made until the 31st January, 1901. It is immaterial that the judgment herein was by consent. It is the same judgment as would have been pronounced *in invitum*: *Great North Western Central R.W. Co. v. Charlebois*, [1899] A.C. 114; *Holmested & Langton's Judicature Act*, 3rd ed., p. 839 *et seq.* It is the duty of the Master to have regard to settled accounts: *Edinburgh Life Assurance Co. v. Allen*, 23 Gr. 230, 239; *Holgate v. Shutt*, 27 Ch.D. 111; 28 Ch.D. 111; *Laycock v. Pickles* (1863), 4 B. & S. 497, 506. A settled account will not necessarily be opened because some interested party asks for a new account. The proper procedure is not to open up the accounts, but to allow a surcharge and falsification: *Gething v. Keighley* (1878), 9 Ch.D. 547; *Chambers v. Goldwin* (1804), 9 Ves. 254, 7 R.R. 181; *Drew v. Power* (1803), 1 Sch. & L. 182, 192; *Parkinson v. Hanbury* (1867), L.R. 2 H.L. 1.

November 3. OSLER, J.A.:—The language of the consent judgment of the 22nd of November, 1905, directing accounts between the parties, must be interpreted in the same way as similar language used in a judgment *in invitum* would be. The parties consent that certain accounts shall be taken, adopting the language of the common form of a judgment for that purpose. Are not the usual rules of law and procedure, statutory and otherwise, to be applied in taking such accounts? I have no doubt that they are,

and that if the parties meant anything else, they would or should have said so. If this be so, the whole argument against the judgment of the Master-in-Ordinary and of the Chancellor affirming it falls to the ground.

The defendant Gardner is the executor of Mehala Gibson, deceased, and as such is also executor of S. B. Burdett, deceased. He filed accounts of his dealings with both estates in the office of the proper surrogate court, where, after a contested examination before the Judge, extending, as it would seem, over nine months, and at a cost of some \$1,700, they were approved. All parties, except the infant defendant, were represented by counsel.

Section 72 of the Surrogate Courts Act, R.S.O., ch. 59, enacts that where an executor has filed in the proper surrogate court an account of his dealings with the estate of which he is executor, and the Judge has approved thereof in whole or in part, if the executor is subsequently required to pass his accounts in the High Court, such approval, except so far as mistake or fraud is shewn, shall be binding upon any person who was notified of the proceedings taken before the surrogate Judge, or who was present or represented thereat, and upon any one claiming under any such person. A similar provision now exists in the case of trustees under a will (1900), 63 Vict. ch. 17, sec. 18, which was in force when the proceeding now relied upon was taken.

Nothing in the judgment suggests that in taking the account thereby directed, the right of the defendant Gardner whether as trustee or executor to avail himself of these provisions as against the plaintiff was intended to be excluded, and so long as the order of the surrogate court stands unimpeached, the accounts filed by the defendant and approved by the Judge are binding upon the plaintiff except in so far as she may be able to shew on proceeding with the reference mistake or fraud therein.

It was urged that this defence was one of estoppel or *res judicata*, and that the defendant could not avail himself of it as he had not pleaded. It is enough to say that even were this the real nature of the defence the action was conducted without pleadings, and that the defence arises for the first time on the evidence when the accounts were investigated in the Master's Office. Its effect is then that which is given to it by the statute or the general rules of law relating to settled accounts.

C. A.  
1906  
GIBSON  
v.  
GARDNER.  
Osler, J.A.



C. A.  
1906

GIBSON  
v.  
GARDNER.

It is unnecessary to refer to any other authorities than those cited in the judgment below.

The appeal must be dismissed, and with the usual result as to costs.

MOSS, C.J.O., GARROW and MACLAREN, J.J.A., concurred.

MEREDITH, J.A.:—The order of reference is very general in its terms; it cannot be restricted in its meaning so as to exclude the accounts which had before been taken in the surrogate court. Nor can the practice respecting accounts settled between the parties be applied, for there were none such; the proceedings in the surrogate court were of a judicial character altogether, and the result there a judgment binding, to the extent provided for in the Surrogate Courts Act, in just the same manner as the judgment of any other court in matters within its jurisdiction: see ch. 14 of 5 Edw. VII. (O.), which seems to have been the legislative answer to the meaning put upon the enactment in question by a Divisional Court in the *Russell* case, 8 O.L.R. 481. But the powers of a Master upon a reference are very large. Under Rule 667, he may inquire, adjudge and report, as to all matters relating to the accounts, as fully as if the same had been referred; and, under Rule 666, it is not necessary that any of such matters should have been stated in the pleadings, or that evidence thereof should have been given before the judgment or order of reference, or that the judgment or order should contain any specific direction in respect thereof. These wide powers have long existed and long been exercised in this Province. But they of course do not empower the Master to do anything in conflict with the judgment or order, or anything beyond its scope. So that, if the proceedings in the surrogate court were a bar to all accounting between the parties, effect could not be given to it by the Master directly, for, in such a case, no judgment or order should have gone; but the proper course would be for the Master to report specially the circumstances, and for the court thereupon to deal with the matter. But such proceedings did not at all affect, or constitute a bar to, all accounting; the later accounts have not been taken, and the reference was therefore proper in any case; and I can see no reason why, neither party having raised the question and had it considered in any earlier

stage of the action, the Master should not—and indeed why he is not bound to—give effect to the enactment in question in so far as it affects any part of the accounting; in short, I agree with him entirely in his ruling as to his power and duty in this respect, which was not based upon any notion that the adjudication in the surrogate court was merely a statement and settlement of accounts between the parties. And, if this were not so, it would be the duty of the Court to interpose and to prevent a second accounting at the cost of the estate. The enactment in question was passed for the prevention of just such things. Legislation and orders of Court became necessary, and were passed, for the prevention of the waste of estates in avoidable administration and partition proceedings. So that the same result, obedience to the statute, would be reached in any case; which even collusion between the parties, with a view to the fruits of the litigation in the shape of costs, ought not ever to be able to avoid; but collusion is not suggested in this case.

There were no pleadings in the action, and the writ of summons made no claim to have the proceedings in the surrogate court reopened, nor any reference to them. The plaintiff's proper course was to have set out such proceedings, and to have sought relief in respect of the accounts there taken, to the extent permitted by the enactment in question. Without the consent of all parties, there would not be a reference until a case was made for it by proving some instances of mistake or fraud, and until it appeared to be a proper case for a reference, as this necessarily was by reason of the subsequent account: it was also a case for a general reference as to all accounts if the person, not bound by the court proceedings by reason of not being a party to or notified of them, desired to re-open the accounts then taken. So that the plaintiffs have themselves to blame for not having the question first dealt with by the court.

I would affirm the ruling of the Master-in-Ordinary and dismiss the appeal.

C. A.

1906

GIBSON

v.

GARDNER.

Meredith, J.A.

G. F. H.

## [DIVISIONAL COURT.]

D. C.

1906

June 19.

Oct. 19.

## TORONTO RAILWAY COMPANY V. CITY OF TORONTO.

*Municipal Corporations—Street Railway—Acquisition of Land for Car-barns—  
Right of City to Expropriate—Action by Company Claiming Declaratory  
Judgment—Discretionary Power.*

The Toronto Railway Company, which has no powers of expropriation, acquired by purchase from the owners certain land in a residential locality, on which they proposed to erect car-barns, being a purpose authorized by the agreement with the city, as validated by 53 Vict. ch. 90 (O.), and submitted the plans to the city for its approval, whereupon a petition was presented to the Board of Control, by the residents of the locality, asking the intervention of the city against such proposed use of the land, as well as against the laying of tracks on certain streets as a means of access to the barns, which was referred to the corporation's counsel for his opinion as to the city's powers. The city had at that time under consideration the acquisition of a specified block of land in the locality for park purposes, but subsequently to the presentation of the petition the Parks and Gardens Committee recommended the expropriation of the company's land for such purpose, and under their instructions a by-law therefor was drafted by the city solicitor. On the matter coming before the council, the recommendation was struck out and the question of procuring park lands referred back to the committee, and on the following day, but after the plaintiffs had commenced this action, the architect was instructed by the board not to deal with the plans, pending the result of the proposed expropriation proceedings. There was nothing to shew that the course pursued by the city was not actuated by good faith. In an action claiming a declaratory judgment of the company's right to so use the land:—

*Held*, that while there was undoubted power in the Court to grant declaratory judgments, it was a discretionary power; and that in this case, the exercise of the discretion by the trial Judge, in refusing to grant such a judgment, should not, under the circumstances, be interfered with.

Judgment of Meredith, C.J., at the trial, affirmed.

The right of a municipal corporation to exercise its expropriatory power discussed.

THIS was an appeal from the judgment of Meredith, C.J., C.P., at the trial of an action at Toronto, on the 24th April and 5th May, 1906.

The action was brought by the Toronto Railway Company alleging that the company was the owner of certain lands in the city of Toronto which had been acquired and were required for the purpose of the company's undertaking and were intended to be used for a "car-barn"; that the defendants were taking steps to appropriate these lands compulsorily for park purposes; that these steps were not being taken in good faith in the public interest, and that in any case the defendants had no power to take the lands compulsorily; and the claim was for a declaration that the defendants had no power to expropriate the lands; that they "are not

liable to be expropriated"; that the defendants were not entitled to raise the money required to pay for the lands without first obtaining the approval of the ratepayers by a by-law for that purpose; and that the defendants' "proceedings for expropriation are not in the public interest," and for an injunction restraining the municipal council of the city of Toronto from proceeding with any expropriation proceedings or interfering in any way with the use and enjoyment of the lands by the plaintiffs for the purposes for which they had been acquired and were intended to be used.

The company did not possess powers of expropriation and the land in question was acquired by the company by purchase from the owners thereof.

*W. Laidlaw*, K.C., for the plaintiffs.

*H. L. Drayton*, for the defendants.

The learned Chief Justice reserved his decision and subsequently delivered the following judgment.

June 19. MEREDITH, C.J.:—No oral testimony was given, but admissions were made to the effect that the plaintiff company is the owner of the lands in question; that it was its intention to erect on them a car-barn according to a plan which was submitted to the architect of the city of Toronto, and his report upon the plan and certified copies of the minutes of the proceedings of the council and its board of control and committees were also put in evidence.

These minutes shew that in the latter end of 1905 the council had under consideration the setting apart as a public park or playground for the north-western section of the city certain lands on the north-west corner of Bloor street and Christie street; and that on the 18th of October of that year a deputation of the property owners and ratepayers in the neighbourhood of the lands in question waited upon the board of control and presented a petition asking that a permit to the plaintiff company for the erection of the car-barn on the lands in question should be refused, and that permission should also be refused for the laying of tracks on certain neighbouring streets for the purpose of providing an entrance to the car-barn.

This petition was on the same day referred to the corporation counsel "for an opinion stating exactly what power the city has

D. C.

1906

TORONTO

R.W.Co.

v.

CITY OF

TORONTO.



D. C.

1906

TORONTO

R.W.Co.

v.

CITY OF  
TORONTO.

Meredith, C.J

or can exercise in relation" to the matter of the petition; and on the 12th December following the board instructed the city architect not to deal with the plans for the car-barn submitted by the plaintiff company "pending the result of the proposed expropriation proceedings."

The committee on parks and exhibition, some time prior to 11th December, 1905, recommended that the lands in question, with two other lots, should be expropriated and dedicated for park and playground purposes, under the provisions of the statutes, and upon the instructions of the committee the city solicitor drafted a by-law for the purpose of giving effect to this recommendation.

On the 11th December, 1905, the city council struck out the recommendation of the committee from its report and referred it back to the committee for further consideration; and on the same day the writ in this action was issued.

The statement of claim contains no allegation that the city council intend to and will, unless restrained, pass the proposed by-law, and so far from such an allegation, if it were made, being supported by proof, the contrary is indicated by the action taken on the 11th December, 1905, to which I have just referred.

No oral evidence was offered to establish the allegation that the proceedings of the board of control and the committees, minutes of which appear in the documents, to which reference has been made, were not taken in good faith in the public interest, for the sole purpose of acquiring the lands in question for the purposes of a public park.

The documents themselves do not afford any such evidence. They shew, indeed, that the committees of the council had under consideration, up to the time when the ratepayers' petition was presented, the acquisition of another property for the purpose of a public park or playground for the section of the city in which the lands in question are situate; but the documents also shew that the matter of acquiring that property was still under consideration on the 11th December, 1905, for on that day the recommendation as to the other site was referred back to the committee for further consideration. The instructions of the board of control to the city architect not to deal with the plans "pending the result of the proposed expropriation proceedings" was not given until the day after this action was begun, and in any case does not appear to me to

afford any evidence of bad faith or to shew what was being done was dictated by anything else than the public interest.

I am far from thinking that the fact, if it were the fact, that the council having under consideration the providing of a park in a particular section of the city, was induced to reject a site which it had under consideration and to choose another because upon that other buildings of a character not desirable for a residential section were about to be put up would afford any ground for the interference by the Court with a discretion which the Legislature has vested in the council of the municipality and not in the Court, and which the Court ought not to and cannot properly interfere with, control or supersede, unless the council is not in good faith exercising its powers, but using them to serve an ulterior purpose which it could not directly accomplish lawfully.

Nor is there any evidence to justify the Court in restraining the council of the defendant corporation from passing the by-law which it is suggested, but neither alleged nor proved it intends to pass, even if the plaintiff company be right in its contention that the lands in question cannot be compulsorily taken.

What right have I to assume that the council will do an illegal act? For all that appears, if the plaintiff company is right the council will be properly advised and will refrain from passing an illegal by-law, but if it should not, what harm will be done? The by-law, if illegal, may be quashed, and if *ultra vires*, will, I apprehend, even though not quashed, give no authority to the defendant corporation to take the lands or interfere with the plaintiff company's possession of them.

I do not deem it necessary to consider whether, as contended by the plaintiff's counsel, the lands in question are devoted to a public use and therefore cannot be taken under the compulsory powers conferred upon municipalities by the Municipal Act, for the case is not one in which a judgment simply declaratory of the rights of the parties should be pronounced. That such a judgment may be pronounced is not open to question, but it is rarely done, and whether it shall or shall not be rests in the discretion of the Court.

That discretion, I think, should be exercised against pronouncing a declaratory judgment in this case. As I have mentioned, should the by-law be passed the plaintiff company has a prompt and

D. C.

1906

TORONTO  
R.W.Co.

v.

CITY OF  
TORONTO.

Meredith, C.J.

D. C.  
1906  
TORONTO  
R.W.Co.  
v.  
CITY OF  
TORONTO.  
Meredith, C.J.

effective remedy by moving to quash it, and if passed and *ultra vires*, it could, I apprehend, do no harm to the plaintiff company even though it were not quashed, for it would be a mere waste piece of paper.

I do not wish to be understood as having formed any opinion for or against the contention of the plaintiff company as to the land in question not being liable to be taken compulsorily, and I ought not, I think, to determine anything as to it, because in my view it is unnecessary for the purpose of deciding this case to do so.

The result is that the action is dismissed, and I see no reason why the costs should not follow the result.

From this judgment the plaintiffs appealed to a Divisional Court.

On October 12, 1906, the appeal was heard before BOYD, C., MAGEE, and MABEE, JJ.

*W. Laidlaw*, K.C., for the appellants. The question is whether the city can expropriate land acquired by the company for the purposes of the railway. The city are precluded from taking expropriation proceedings on two grounds; first, the company are entitled to acquire and hold the lands under the terms of their agreement with the city, namely, for the accommodation of the company as a site for a car-barn, and second, the land having been acquired by the company for a public use, namely, the car-barn, it cannot be expropriated for another public use, which has the effect of diverting it from the use contemplated by the company: *Re Bronson and City of Ottawa* (1882), 1 O.R. 414. The learned Chief Justice was of the opinion that the company's motion was premature. The company are not, however, bound to wait until actual expropriation proceedings have been commenced. It is sufficient to shew that such proceedings are threatened. The company are entitled to a declaratory judgment declaring their rights in the matter.

*H. L. Drayton* and *W. Johnston*, for the defendants. The plaintiffs at the trial failed to shew that any expropriation proceedings were being taken, or threatened to be taken by the city, and therefore, as the learned Chief Justice properly found, they had no *locus standi* to apply to the Court for an injunction. The Court will

not, in such a case, give a declaratory judgment: *Thompson v. Cushing* (1899), 30 O.R. 123; *Miller v. Robertson* (1904), 35 S.C.R. 80, 91; *Attorney-General v. Cameron* (1899), 26 A.R. 103; *Barraclough v. Brown*, [1897] A.C. 615; *Honour v. Equitable Life Ins. Society of the United States*, [1900] 1 Ch. 852; *Offin v. Rochford Rural District Council*, [1906] 1 Ch. 342. There is nothing to prevent expropriation proceedings by the city as representing the public, while the railway company do not represent the public, and the acquisition of the land by it was not in the strict sense for a public use: *Lewis on Eminent Domain*, 2nd ed., sec. 170; *Re Niagara Falls and Whirlpool R.W. Co.* (1888), 108 N.Y. 375; *Liskeard Union v. Liskeard Water Power Works Co.* (1881), 7 Q.B.D. 505; *Tiedman on Municipal Corporations*, secs. 233-4; *Regina v. Wycombe R.W. Co.* (1867), L.R. 2 Q.B. 310; *Rex v. Pease* (1832), 4 B. & Ad. 30; *Attorney-General v. Ely, Haddenham and Sutton R.W. Co.* (1869), L.R. 4 Ch. 194; *Pugh v. Golden Valley R.W. Co.* (1879), 12 Ch.D. 274; *Keller v. City of Corpus Christi* (1879), 50 Texas 614.

October 19, 1906. BOYD, C.:—The relief sought in this action is to restrain the city from proceeding to expropriate property belonging to the plaintiffs, the railway company.

It is alleged and claimed that the proceeding to expropriate was *ultra vires*, because the land in question has been purchased or acquired under the terms of an agreement made with the city and incorporated in the Statutory Charter, 53 Vict. ch. 90 (O.).

The ground relied on is that the property is now held by the plaintiffs for public or quasi-public use, and is necessary for the use and accommodation of the railway as a site for car-barns; and that expropriation powers cannot be legally employed to divert the land from this necessary use as contemplated by the statute.

The question has resolved itself into a merely academic one, as the proposal to expropriate the land has not been prosecuted, and it may be enough for the purposes of the argument to say there appears to be no incapability in the legitimate expropriation by the city of land owned by the railway when that land is not essential to the purposes of the undertaking. That the land may be convenient for the railway purposes would not be, I conceive, an answer to the *bonâ fide* action of the city in employing its expropriating powers.

D. C.  
1906

TORONTO  
R. W. CO.  
v.  
CITY OF  
TORONTO.



D. C.  
1906  
TORONTO  
R.W.Co.  
v.  
CITY OF  
TORONTO.  
Boyd, C.

The case of *Re Bronson and City of Ottawa*, 1 O.R. 414, relied on by the plaintiffs, does not support that contention in its absolute form. Many expressions in it go to shew that quasi-public property may be the subject of expropriatory and paramount powers exercised by municipal corporations, in pursuance of a policy for bettering or improving the city or other municipality. If the railway obtained its property by the exercise of a power of expropriation, a grave question would arise if the city sought afterwards to further expropriate for its uses property already expropriated by the railway for its uses. There might arise in such case a conflict of paramount powers not contemplated by the Courts or the Legislature; but no such difficulty exists when the contest is between a corporate body not possessed of compulsory power of acquisition and a municipal body, which does possess such powers in the way of expropriation.

The rule is recognized in American cases that lands owned by a company whose business constitutes a public use not in actual occupation or not essential to the undertaking, stands on the same footing as that of a private owner, and may be expropriated: see *Cincinnati, Sandusky and Cleveland R.W. Co. v. Village of Belle River Centre* (1891), 48 Ohio St. R. 273; and *Youghioghany Bridge Co. v. Pittsburg and Connellsville R.W. Co.* (1902), 201 Penn. St. 457. Other cases are referred to and the matter discussed in 15 Cyclopædia of Law and Procedure, pp. 612 *et seq.*

The judgment should be affirmed with costs.

I agree with the ground of decision below that this is not a case for a declaratory judgment.

MAGEE, J.:—The suggestion that the company's land be taken by the city was not adopted by the council, but referred back to the committee for reconsideration. There was no threatened course of action by the council which would affect the plaintiffs. The claim for an injunction was practically abandoned and merely a declaratory judgment asked for. In the absence of danger involving the actual relief sought by the writ, I do not see that the company are any better entitled to an abstract declaration which may never be required than the city could not expropriate than the city would be to ask one that it could do so, if it so desired: *Stewart v. Guibard* (1903), 6 O.L.R. 262; *Bunnell v. Gordon* (1891),

20 O.R. 281; *Barraclough v. Brown*, [1897] A.C. 615; *N.E. Marine, etc., Co. v. Leeds Forge Co.*, [1906] 1 Ch. 324; *Offin v. Rochford Rural District Council*, [1906] 1 Ch.D. 342.

The judgment appealed from should stand and the appeal be dismissed with costs.

The question of the right of the municipality to expropriate for the public the land of a proprietary corporation having itself no expropriatory powers, but whose works have the character of a public utility, it is unnecessary to enter upon, affected as it may be by the agreements and legislation concerning these parties specially.

MABEE, J.:—The Court has undoubted authority to grant a declaratory judgment without incidental relief. The cases, however, shew that this is a discretionary power: *Bunnell v. Gordon*, 20 O.R. 281; *Thomson v. Cushing*, 30 O.R. 123.

The learned Chief Justice, in the judgment in appeal, deals very fully with the facts and exercises the discretion of the Court in refusing the declaration asked for. I cannot say that he was in error in the exercise of such discretion, and the appeal, in my opinion, fails upon that ground alone. I say nothing as to the powers of the city to expropriate the lands in question.

G. F. H.

D. C.  
1906

TORONTO  
R. W. Co.  
v.  
CITY OF  
TORONTO.  
—  
Magee, J.

## [DIVISIONAL COURT.]

D. C.

1906

Aug. 1.  
Dec. 20.LONDON AND WESTERN TRUST CO. V. THE CANADA FIRE  
INSURANCE CO.

*Fire Insurance—Lease—Change in Nature of Risk—Absence of Notice or Knowledge by Landlord—3rd Statutory Condition—Control of Landlord—Omission to Notify Insurance Company.*

After the owner of dwelling-house property had effected an insurance thereon he leased the premises to a tenant who, without the owner's knowledge, changed the occupation thereof, by bringing in a stock of goods, which he sold out to pedlars :—

*Held*, that the owner was not affected by the third statutory condition, R.S.O. 1897, ch. 203, sec. 163 (3), which requires notice of any change material to the risk within the control or knowledge of the insured, to be given to the company, for, being under lease, the premises were not under the owner's control, while the change in the occupation was without his knowledge, and the fact that the change was made by the tenant after the making of the policy was immaterial.

Judgment of FALCONBRIDGE, C.J., at the trial reversed.

THIS was an appeal from the judgment of Falconbridge, C.J.K.B., at the trial at London on June 19th, 1906.

*George C. Gibbons*, K.C., and *G. S. Gibbons*, for the plaintiffs.

*N. W. Rowell*, K.C., for the defendants.

The action was on a policy of fire insurance, dated October 10th, 1904, for three years, commencing October 4th, on a building owned by the plaintiffs in Sudbury.

The defence was under the third statutory condition, which provides that "Any change material to the risk and within the control or knowledge of the insured shall avoid the policy as to the part affected thereby, unless the change is promptly notified in writing to the company or its local agent; and the company when so notified may return the premium for the unexpired period and cancel the policy, or may demand in writing an additional premium, which the assured shall, if he desires the continuance of the policy, forthwith pay to the company, and if he neglects to make such payment forthwith after receiving such demand, the policy shall be no longer in force."

The fire occurred on November 30th, 1905.

At the time the insurance was effected the building was owned by the Birbeck Loan Company, which went into liquidation in May or June, 1905, the plaintiffs being the liquidators. In March, 1905, the company, by a written lease, leased the building for six months as a dwelling-house to a Syrian named Abram Ferres, at \$23 a month, and after the expiration of the lease the lessee remained on as a monthly tenant at a reduced rent. After the lessee had been in possession for a month, he brought a stock of goods into it, consisting of notions, dry goods, gents' furnishings, clothing and a little hardware and jewelry, which was stored in one of the rooms of the house on the ground floor, some of the goods being laid out on shelves, and the rest being in trunks and packing boxes. There was generally about \$2,000 worth of goods there. The lessee carried on a kind of wholesale business, selling goods to peddlars, who, from time to time, would come to the house and stay a night or two, the lease having been made through a solicitor in Sudbury, who did whatever business the company had to do there, they having no regular agent there. The rent was paid each month by the lessee at the office of the solicitor, who, it appeared, had not been in the building since the lease was effected, and knew nothing about the stock of goods being stored there. There was no sign on the building or anything to indicate that any business was being carried on in the building.

The insurance in question had been effected through a local agent named Alexander Fournier, who acted for the defendant company, as well as for some fifteen other companies. Subsequently, it appeared, acting on behalf of the Montreal Insurance Company of Canada, he took a risk on the lessee's stock of goods, visiting the premises for such purpose. No notice of the fact of the goods being so stored in the building was given by the plaintiffs to the company or to Fournier, nor did Fournier himself ever notify the company. The plaintiffs claimed that no breach of the condition had been proved, for that, under the condition, the change in the risk must be within the control or knowledge of the insured, and they had no control, the property being under lease; and the evidence showed that they had not any knowledge; and, further, that notice to the company or its local agent was not necessary, notice not being necessary where there was knowledge, and that knowledge acquired by the local agent, when he effected

D. C.  
1906  
LONDON  
AND  
WESTERN  
TRUST  
Co.  
v.  
CANADA  
FIRE  
INSURANCE  
Co.



D. C.  
1906

LONDON  
AND  
WESTERN  
TRUST  
Co.  
v.  
CANADA  
FIRE  
INSURANCE  
Co.  
Falconbridge,  
C.J.

the insurance on the stock of goods, of the change in the risk, must be deemed to be the knowledge of the company.

The learned Chief Justice reserved his decision, and subsequently delivered the following judgment:—

August 1. FALCONBRIDGE, C.J.:—The plaintiff company is the liquidator of an insolvent company which owned certain buildings in the town of Sudbury. These buildings were insured by the defendant company under policy bearing date the 10th October, 1904, for three years from the 4th October, 1907, and were destroyed by fire on the 30th November, 1905.

This action is brought to recover the amount of the insurance, and the substantial defence is that the insolvent company let and leased to one Ferres, a Syrian merchant, a portion of the insured buildings, and that Ferres took possession thereof, and kept therein for sale a stock of merchandise to the value of some thousands of dollars, and therein and thereon carried on the business of a merchant, which change of occupation was material to the risk, which thereby became a mercantile one, and more hazardous than that described in the application for insurance.

It was admitted that the change of occupation was material to the risk, and it was proved that the defendant company could not or would not make a contract for insurance on mercantile risks for a term exceeding one year.

There was no proof of actual notice to the insolvent company of the change of occupation, although it would not be very difficult to come to the conclusion that the agent of the insolvent company who signed the application for the insurance had knowledge of it. But I think that the question of notice or knowledge is not material.

Mr. Bunyon (in his *Law of Fire Insurance*, 5th ed., p. 166) states the law to be as follows: "Where there has been a material alteration which has rendered a policy void, it sometimes happens that the alteration or breach has been made, without the knowledge of the assured, by his tenant or agent. This will not render the unauthorized act the less an infringement of the conditions, so as to keep the policy in force, but the offending party may be responsible to his landlord or principal." And he cites numerous American cases in support of the proposition. I refer also to *Kuntz v. Niagara District Fire Ins. Co.* (1866), 16 C.P. 573.

One Fournier, an insurance agent, residing in Sudbury, who writes risks for about sixteen companies, and who is named on the back of the present policy as the agent of defendant company, undoubtedly had notice and knowledge of the condition of affairs. On the 8th of April, 1905, he took the application for insurance on the stock for a Montreal company, and he knew all about Ferres keeping goods there. But I am of the opinion that Fournier's knowledge does not affect the defendant company, as there was no notice in writing to the company or its local agent under statutory conditions No. 3 and No. 20: *Morrow v. Lancashire Ins. Co.* (1898), 29 O.R. 377; same case (1899), 26 A.R. 173; *Guerin v. Manchester Fire Assurance Co.* (1898), 29 S.C.R. 139.

It is unnecessary in the view which I take of this branch of the case to discuss the application of statutory conditions No. 13 and 15.

The action will be dismissed with costs.

From this judgment the plaintiffs appealed to a Divisional Court.

On December 19th, 1906, the appeal was heard before BOYD, C., MAGEE and MABEE, JJ.

*G. C. Gibbons*, K.C., for the appellants. The defence here is based on the third statutory condition. To bring the assured within its terms it must be shewn that the change made was within his control or knowledge. There is neither knowledge or control here. The only person who was in a position to acquire knowledge was Maclellan, who lived in the place and who had acted for the company in drawing up the lease; but it is quite clear he was never informed of or aware of the change, and he had not been on the premises since the lease was made, the tenant coming to the office to pay the rent. Knowledge must be brought home to the insured, it will not be inferred. It will not be assumed that the insured would conclude that his tenant would change the nature of his occupation: *Merrill v. Insurance Company of North America* (1885), 23 Fed. R. 245; *Nebraska and Iowa Ins. Co. v. Christiensen* (1890), 45 N.W.R. 924, 927; *North British Mercantile Ins. Co. v. Union Stockyards Co.* (1905), 87 S.W.R. 285; *East Texas Fire Ins. Co. v. Kempner* (1896), 34 S.W.R. 393; *Heneker v. British America Assurance Co.* (1864), 14 C.P. 57. By the condition the local

D. C.

1906

LONDON  
AND  
WESTERN  
TRUST  
Co.CANADA  
FIRE  
INSURANCE  
Co.Falconbridge,  
C.J.

D. C.  
1906

LONDON  
AND  
WESTERN  
TRUST  
Co.  
v  
CANADA  
FIRE  
INSURANCE  
Co.

agent is placed in the same position as the company as to receiving notice, so that notice to or knowledge of the agent is the same as that of the company. The object of the notice is to give the company knowledge of the fact, and where there is knowledge there is no necessity for notice. The agent here acquired the knowledge, which it was his duty to communicate to his principals, and therefore it was unnecessary to give any notice. If the company did not wish to continue the risk they should have notified the insured and tendered him back a proportionate part of the premium: *North British and Mercantile Ins. Co. v. Steiger* (1888), 124 Ill. 81; *Capitol Ins. Co. v. Bank of Pleasanton* (1893), 31 Pacific R. 1069. Where some action on the part of the company is necessary to put an end to the risk and they omit to do so, they are estopped from afterwards setting up the invalidity of the policy: Clement on Fire Insurance, vol. I., p. 291, rule 5, p. 428, rules 29, 30; *Pollock v. German Fire Ins. Co. of Pittsburg* (1901), 86 N.W.R. 1017.

*N. W. Rowell, K.C.*, for the respondents. The insurance here, which was for three years, was effected on the representation of the insured that the building was used as a dwelling house, and the rate of premium was based on such use, a mercantile risk only being effected for a year at a very much higher rate of premium. The increase of risk avoids the policy: *Grant v. Howard Ins. Co. of New York* (1843), 5 Hill N.Y. 10; Bunyon on Fire Insurance, 5th ed., p. 166; May on Insurance, 4th ed., secs. 230-1. The condition here amounted to a warranty, that during the continuance of the risk the mode of occupation would not be changed: *Sillem v. Thornton* (1854), 3 E. & B. 868; Bunyon on Fire Insurance, 5th ed. 152, 158; *North America Fire Ins. Co. v. Zaenger* (1872), 63 Ill. 464. The condition would be useless if the insured could, after effecting the risk, relieve himself from the effect of the condition by simply saying he had paid no further attention to the building, or knew nothing about it. In a small place like Sudbury it is hard to realize that a business such as Ferres was carrying on could be so carried on without every body knowing all about it. The cases shew that in a case such as this, knowledge will be imputed: *Howells Executors v. Baltimore Equitable Society* (1860), 16 Md. 377; *Moore v. Phoenix Ins. Co.* (1866), 64 N.H. 140, 145; *Hoxsie v. Providence Mutual Fire Ins. Co.* (1860), 6 Rh. Id. 517. The fact of the property being leased does not prevent it being under

the insured's control. There is a distinction between the case where the lease is before and after the policy. In the latter case the insured is assumed to continue the control, and where there is control, knowledge is immaterial: *Grant v. Howard Ins. Co. of New York* (1843), 5 Hill N.Y. 10. Where the premises are under the control of the insured, knowledge of the change is not essential: *Stetson v. Massachusetts Mutual Fire Ins. Co.* (1808), 4 Mass. 330; *Seth Padelford v. Provincial Fire Ins. Co.* (1835), 3 Rhd. Id. 102, 105; *Aldston v. Old North State Ins. Co.* (1899), 80 N.C. 241; *Liverpool and London Ins. Co. v. Gunther* (1885), 116 U.S.R. 113, 128-9; Bunyon on Fire Insurance, 5th ed., p. 166; May on Insurance, 4th ed., sec. 230-1. The fact of knowledge by the agent is not sufficient. The condition is express that there must be a written notice: *Aldston v. Old North State Ins. Co.* 80 N.C. 241.

December 20. BOYD, C.:—This case requires that the legal effect of the statutory condition as to change of risk in a fire policy should be considered as found in R.S.O. 1897, ch. 203, sec. 168 (3).

It is laid down in the text of the American and English Encyclopædia of Law, 2nd ed., vol. 13, p. 286: "Under the usual form of policy it is avoided only by an increase of risk by any means within the knowledge or control of the assured, and therefore such an increase, if unknown to him, or not within his control, is not fatal." To support this text is cited *Breuner v. Liverpool, London & Globe Ins. Co.* (1875) 51 Cal. 101, 21 Am. Rep. 703, and the Canadian case of *Heneker v. British America Assurance Co.* 14 C.P. 57.

The "usual form" refers to what is called "standard form of policy," i.e., one framed by the statute of the State, having the stipulation that "if the hazard shall be increased by any means within the control or knowledge of the assured," it shall be void (19 Cyclo. 711), and among the cases cited is the one relied on by Mr. Gibbons, of *Nebraska and Iowa Ins. Co. v. Christiensen*, 29 Neb. 572, 45 N.W.R. 924, 26 Am. St. R. 407. This case, in which the policy was as in our statute, decides that when a tenant, without the knowledge or consent of the insured, increases the risk, it does not avoid the policy, unless it also contains a stipulation to the effect that an increase of risk by the tenant will render it void.

D. C.  
1906  
LONDON  
AND  
WESTERN  
TRUST  
Co.  
v.  
CANADA  
FIRE  
INSURANCE  
Co.



D. C.

1906

LONDON  
AND  
WESTERN  
TRUST  
Co.  
v.  
CANADA  
FIRE  
INSURANCE  
Co.

Boyd, C.

So in a very late case cited from Kentucky, *North British Mercantile Co. Ins. v. Union Stockyards Co.*, 87 S.W.R. 285, where the words of the condition are the same—not in the copulative, as suggested during the argument, but in the disjunctive—"control or knowledge," and where the tenancy was as here subsequent to the policy, it was held that the policy was not avoided by the tenant using the premises in a more hazardous way without the knowledge of the insured, and otherwise than allowed by the lease.

But the most satisfactory case in its reasoning, and one binding upon us, if it is not distinguishable, is *Heneker v. British America Assurance Co.*, 14 C.P. 57, at p 62. It was there pointed out by Adam Wilson, J., for the Court, that during the lease the tenant was as much owner of the land for his limited interest as the owner, the tenant of the fee, is for his larger interest. The landlord could not enter upon his tenant unless by a reservation to that effect without becoming a trespasser—the same as if he were the merest stranger, and during his term the tenant may build as much as he pleases (without regard to the landlord) so long as he does not commit waste. If (he says) the change had been made with the express consent of the landlord, it might have been well said that the building was under his control, but when made without his knowledge we do not think that it must be held to be within his control.

The only distinction offered in this case was that the change was made by a tenant who was let into possession after the policy. This is not a material difference, having regard to the reasoning of Mr. Justice Wilson. When the policy was made it was known that the premises were of tenement character, occupied or to be occupied by tenants. The subsequent tenant made a change in the occupancy by bringing in a quantity of goods to be sold, creating, it is said, a mercantile risk. Be that as it may, there was no structural change—no waste—nothing in respect of which the landlord could have interfered had he known, and at best the increase of risk is so slight that the finding might well have been the other way.

But granted some increase of risk, the change was made by the tenant for his own purposes, not as an agent of the landlord, and not with the assent and not with the knowledge of the landlord. This being so, the cases justify the conclusion they were made by a

stranger (or as if a stranger), one over whom the landlord had no control.

That there was a break in the tenancy is of no importance. The change, if made, by any tenant who is in for the time being as owner, is one which is not within the control of the landlord. Had he known of it, whether within his control or not, it might be his duty to notify the company. But no state of facts is proved here to shew that the landlord should do any more than he did, *i.e.*, remain passive, because unaware that any change was being made in the premises for which the tenant regularly paid his rent.

The cases upon which the judgment in appeal rests are ones in which the condition was absolute against any change of risk, in which case the insured is liable to lose his insurance if anyone makes the change, whether known to or controllable by him or not.

In my opinion the judgment should be reversed, and the company be ordered to pay the amount insured and costs of action and appeal.

MAGEE and MABEE, JJ., concurred.

G. F. H.

D. C

1906

LONDON  
AND  
WESTERN  
TRUST  
Co.

v.

CANADA  
FIRE  
INSURANCE  
Co.

Boyd, C.

## [IN THE COURT OF APPEAL.]

C. A.

1906

Nov. 30.

## SCHWOOB V. THE MICHIGAN CENTRAL RAILROAD CO.

*Negligence—Master and Servant—Defect in Machinery—Defective System of Inspection—Workmen's Compensation for Injuries Act—R.S.O. 1897, ch. 160, sec. 3, sub-sec. 1, sec. 6, sub-sec. 1.*

On the trial of this action—which was against a railway company to recover damages for the death of the deceased through scalding by the escape of steam occasioned by the giving away of a water tube in a locomotive engine on which he was working—the jury, in answer to questions submitted to them, which, with the answers to them, are set out in the report, found that the death was caused by a defect in the condition of the locomotive, “through the defendants not supplying proper inspection,” the defect itself not being specified, but from a discussion which the trial Judge had with the jury when they brought in their answers, and from the answers to further questions submitted to them, such defect it appeared consisted in the fact that the end of the tube in question had not been sufficiently “belled” by one J., who had put the tube in the boiler:—

*Held*, that there was no evidence to support liability at common law, but that the evidence and findings of the jury sufficiently established what the defect was, and that J. was a person entrusted with the work, so that there was liability under the Workmen's Compensation Act, in respect of which the deceased's widow and administratrix could maintain the action, and was entitled to recover the damages assessed by the jury under the above Act.

MEREDITH, J. A., dissenting on the question of liability under the Act.

THIS was an action brought by the widow and administratrix of Robert H. Schwoob, deceased, to recover damages for his death while in the employment of the defendants as locomotive foreman, resulting from his being scalded, through, as was alleged, the defendants' negligence, by steam formed by the escape of hot water into the fire box of one of the defendants' locomotive engines, through the drawing out of one of the hot water tubes or pipes from the end of the tank in which it was fastened.

The action had been previously tried, and a new trial directed by the Divisional Court, which was affirmed by the Court of Appeal. The judgments are reported in 9 O.L.R. 86 and 10 O.L.R. 647.

The trial herein was before TEETZEL, J., and a jury, at St. Thomas, on March 26th, 1906.

*T. W. Crothers and S. Price*, for the plaintiff.

*D. W. Saunders and E. C. Cattnach*, for the defendants.

The evidence shewed that the tube which drew out of the end of the tank, had been put in the engine in the defendants' workshop in order to replace one that had become defective, and there was evidence that the tube drew out because the defendants' workman, whose duty it was to attend to such repairs, had not fastened it securely by "belling" the end of the tube sufficiently to prevent it drawing out.

The evidence also shewed that in this class of engine there were four of such tubes, and that all four tubes had been put in the engine at the same time. After these repairs the engine had been in use for several months without any defect being apparent in any of the tubes; that some of the other tubes had appeared to be leaking, and were replaced, but no defect was discovered in the tube in question prior to the accident, though the engine and tubes were constantly inspected.

It was not claimed that Thomas Jeffers, the workman, who fastened the tubes, including the tube in question, in the boiler, was not a competent workman; but it was charged that it was his carelessness and negligence in failing to fasten the end of the tube properly that caused the accident.

On behalf of the plaintiff it was also contended that there should have been inspection of Jeffers' work before the engine was allowed to be used, after the tubes had been put in; and also that the subsequent inspection of the engine from time to time was not sufficient, having regard to the possibility of such tubes warping and drawing out; and that the defendants were liable at common law for negligence in not providing for such inspection.

It was also contended that Jeffers was a person "entrusted with the duty of seeing that the condition or arrangement of the ways, works, machinery, etc., are proper," so as to make the defendants, in any event, liable for his negligence under section 3 (1) and section 6 (1) of the Workmen's Compensation for Injuries Act, R.S.O. 1897, ch. 160.

At the conclusion of the plaintiff's case a motion was made for a nonsuit, and at the conclusion of the whole case to have judgment entered for the defendants, both of which were refused, and the case was submitted to the jury with certain questions which with the answers thereto, were as follows:—

C. A.

1906

SCHWOOB

v.

MICHIGAN

CENTRAL

R.W.Co.



C. A.

1906

SCHWOOB

v.

MICHIGAN

CENTRAL

R.W.Co.

1. Was the death of the plaintiff's husband caused by reason of any defect in the condition or arrangement of the locomotive on which he was working? A. Yes.

2. If your answer is "yes," you will state in what such defect consisted. A. We find in our opinion that said defect occurred by the defendants not supplying proper inspection.

3. If there was any such defect, did it arise from the negligence of the defendants or of some person in their employment entrusted by the defendants with the duty of seeing that the condition of the locomotive was proper? Answered by 2.

4. If your answer to this question is "yes," and you are of the opinion that the negligence was that of an employee of the defendants, who was that employee? Answered by 2.

5. Or if there was any such defect, was it not discovered or remedied owing to the negligence of the defendants or of some person in their employment entrusted by them with the duty of seeing that the condition of the locomotive was proper? Answered by 2.

6. If you answer this question "yes," and are of the opinion that the negligence was that of an employee, who was the employee? Answered by 2.

7. Were the defendants guilty of negligence in connection with the system provided for by them for the inspection of the locomotive in question? A. Yes.

8. If "yes," in what did the negligence consist? A. By not providing proper inspection.

9. If the defendants were guilty of any negligence, did such negligence cause the death of the plaintiff's husband? A. Yes.

10. In what sum do you assess the plaintiff's damages, if entitled to recover under common law? We decide that the plaintiff shall be awarded nine thousand dollars, and recommend that your Lordship use your own jurisdiction, if you have any, in safeguarding of at least a portion of this money for training and educating the plaintiff's children.

On the jury returning with their answers to the questions submitted, the learned Judge pointed out that if on appeal it should be held that there was no common law liability they could only award the amount of three years' salary, amounting to \$3,240—or less. He also desired a finding as to whether there was any

defect in the way the tube was fixed by Thomas Jeffers; and he submitted the following additional questions to the jury, which with the answers thereto were as follows:—

Q. Was there any defect in the way the tube in question was fixed in the boiler by Thomas Jeffers at the time it was put in? A. Yes, and at the time we think that there should have been proper inspection.

Q. If you find there was a defect in the way in which Jeffers put the tube in, what was that defect? A. It was not properly belled.

Q. Are you of opinion that proper inspection would have revealed that defect? A. Yes.

Q. At what amount do you assess the damages if it should be held that the plaintiff is only entitled to recover under the Workmen's Compensation Act? A. \$3,240.

The learned Judge thereupon entered judgment for the plaintiff with \$9,000 damages, and apportioned the amount by giving \$3,000 to the widow and \$2,000 to each of the deceased's three children.

From this judgment the defendants appealed to the Court of Appeal.

On September 27, 1906, the appeal was argued before Moss, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.

*I. F. Hellmuth*, K.C., and *D. W. Saunders*, for the appellants. There is no liability at common law. At common law a duty is undoubtedly imposed on the employer to supply proper machinery and to have it properly inspected. This must be done personally, or by the employment of competent persons for the purpose. In the case of a corporation, the latter is the only course open to them, for they can only act through persons employed by the corporation. The engine was properly constructed, and was also duly inspected. It was shewn in the evidence for the plaintiff that an inspection once a week would be sufficient, whereas an inspection was made here at least twice a week. The contention of the plaintiff that the pipe or tube was not properly belled is disproved by the evidence, for the evidence shews that the belling was carefully examined in the inspection. No neglect of duty is brought home to the defendants. Jeffers who did the work was a fellow servant of the plaintiff in a common employment: *Woods v. Toronto Bolt*

C. A.

1906

SCHWOOB  
v.  
MICHIGAN  
CENTRAL  
R.W.Co.

C. A

1906

SCHWOOB  
v.  
MICHIGAN  
CENTRAL  
R.W. CO.

and *Forge Co.* (1905), 6 O.W.R. 637; *The Petrel*, [1893] P. 320; *Morgan v. Vale of Neath R.W. Co.* (1865), 5 B. & S. 570, 580, affirmed (1866), L.R. 1 Q.B. 149; *Howells v. Landore Siemens Steel Co.* (1874), L.R. 10 Q.B. 62; *Waller v. South Eastern R.W. Co.* (1863), 2 H. & C. 102, 112; *Farwell v. Boston and Worcester R.W. Co.* (1842), 4 Metc. 49, 59-60. The Workmen's Compensation Act does not apply. There is no evidence of negligence on the part of any person entrusted with the duty of seeing as to the condition or arrangement of the ways, works or machinery. In no event can the findings of the jury stand, as they are based merely on conjecture. As to the amount of the damages, they are clearly excessive. The plaintiff was earning \$1,000 a year, and it is apparent this would not justify an allowance of \$9,000.

*T. W. Crothers*, for the respondent. The employer at common law is bound to take all reasonable precautions to ensure the safety of his employees. It was therefore the defendants' duty to see that the engine was in perfect order. Unless the pipe or tube was properly belled it is likely to draw out, and therefore to be dangerous. It was therefore the defendants' duty to see that it was properly belled, and that the belling was from time to time properly inspected, which the evidence shewed they had failed to do: *Webster v. Foley* (1892), 21 S.C.R. 580. All they did was to see the pipe was properly rolled, the object of rolling being merely to prevent leakage. There was no proper mode of inspection. Jeffers, who was entrusted with this work, was not sufficiently skilled for the purpose. Had there been a proper inspection the defect would have been seen and remedied. There should have been a competent inspector. Jeffers, however, was specially entrusted with seeing to this particular branch of the work, and could in no sense be deemed to be a fellow servant: *Markle v. Donaldson* (1904), 7 O.L.R. 376, 8 O.L.R. 682; *Beven on Employers' Liability*, 2nd ed., 178. The defendants were therefore liable at common law: *Beven's Employers' Liability*, 2nd ed. 16; *Minton-Senhouse on Accidents to Workmen*, 2nd ed. 12-13; *Commarrford v. Empire Limestone Co.* (1905), 11 O.L.R. 119. There was also liability under the Workmen's Compensation Act. Jeffers was a person entrusted with the duty of seeing that the pipe was properly belled, and through his incompetence or negligence it was shewn the belling was insufficient: *Choate v. Ontario Rolling Mill Co.* (1900),

27 A.R. 155; *McNaughton v. Caledonian R.W. Co.* (1857), 28 L.T.N.S. 376; *Spaight v. Tedcastle* (1881), 6 App. Cas. 217; *Northern Pacific R.W. Co. v. Hambly* (1894), 154 U.S.R. 349; *Beven on Employers' Liability*, 2nd ed., 176. The damages are in no way excessive.

C. A.  
1906  
SCHWOOB  
v.  
MICHIGAN  
CENTRAL  
R.W.Co.

November 30, 1906. OSLER, J.A.:—I agree that the evidence fails to make out a case of common law liability on the part of the company.

The judgment may, however, be supported for damages under the Workmen's Compensation Act if the findings of the jury either by themselves or read with the learned Judge's charge and with facts proved or admitted and not denied, come up to what is required by that Act in order to fix liability upon an employer. Upon the whole I think they do.

The case was very fully and carefully explained to the jury in the learned Judge's charge, and the difference between the liability of the employer at common law and under the statute pointed out to them. It is very evident that they meant, if they could possibly do so, to fasten upon the defendants that ground of liability which would enable them to assess the damages at large; that result cannot stand, but certain of the findings may be referred to to support the judgment for the reduced sum recoverable on the narrower ground.

They found that the death of the plaintiff's husband was caused by reason of a defect in the condition or arrangement of the locomotive on which he was working. Their answer to the second question as to what such defect consisted in, is that the defect occurred by the defendants "not supplying proper inspection," and as want of inspection, unless there was some existing defect which inspection would have disclosed, is not defect, or by itself, negligence, the answer is not very intelligible until it is remembered that the only defect about which the contest was waged throughout the trial was that the tubes of the engine had not been properly belled, and in the conversation which took place between the trial Judge and the jury after they had brought in their answers to the first set of questions this is made clear. They all agreed, they said, that the defect which caused the accident was that the belling of



C. A.

1906

SCHWOOB

v.

MICHIGAN

CENTRAL

R.W.CO.

Osler, J.A.

the tube had not been properly done, adding that there should have been more proper inspection, which would have discovered it.

The answers to questions 3 to 6 may be passed over; indeed it may be more properly said that the jury left these questions unanswered by referring in each instance to their answer to question 2, as making it unnecessary to give specific answers, their finding as to the ground of liability resting upon that. After the discussion referred to, the jury, in answer to further questions founded upon it, said that there was a defect in the way the tube was fixed in the boiler by Jeffers at the time it was put in, and that this defect was that it was not properly belled. Reading these answers with the answer to the first question and the discussion referred to, a case for liability under sec. 3 (1) of the Act is made out subject to the qualification of sec. 6 (1) being also established, namely, that Jeffers, the person from whose negligence the defect in the locomotive arose, was a person who had been entrusted by the defendants with the duty of seeing that its condition was proper. There is no dispute—there was none throughout the whole course of the trial, and the learned Judge in his charge referred to it again and again,—that Jeffers was the person in the employ of the defendants who was so entrusted. We have it therefore established that the death of the plaintiff's husband was caused by a defect in the condition of the locomotive on which he was working; that this defect consisted in the improper way in which Jeffers fixed the tubes in the boiler of the locomotive, and that he was the person who had been entrusted by the defendants with the duty of having this properly done—in other words, the duty of seeing that the condition of the locomotive was proper. This is all that is necessary to fulfil the requirements of the Act in such a case as the present.

I am unwilling to send the case down for a third trial without any prospect of a different result if by any reasonable interpretation of the answers of the jury read in the light of the charge and of the admitted facts, this can be avoided. If I have been unduly swayed by this consideration I must leave it for a higher tribunal to say so.

See *Jamieson v. Harris* (1905), 35 S.C.R. 625; *Tooke v. Bergeron* (1897), 27 S.C.R. 567; *Moore v. Grand Trunk R.W. Co.* (1907), S.C.R., not reported, and of which the reasons for the decision are not yet known.

The judgment should therefore be varied and the recovery limited to the alternative amount found by the jury, the method of arriving at which was not complained of. There will be no costs of the appeal, success being divided.

MOSS, C.J.O., GARROW and MACLAREN, JJ.A., concurred.

C. A.

1906

SCHWOOB  
v.

MICHIGAN  
CENTRAL  
R.W.Co.

MEREDITH, J.A.:—The plaintiff's present difficulty has arisen from too intently pursuing the shadow of a greater claim under the common law, and putting aside too much, that which may have been the substance of a lesser—but yet large—claim under the statute law; a pursuit in which the jury, in a desire to award to her "all that was possible to award," seem to have joined.

The first seven questions submitted to them were framed with the view to the jury finding negligence on the part of the witness Jeffers, or some other workman, and finding the other facts which would make the defendants liable under the statute, if they found against them at all; and the 7th and following questions were directed to the subject of liability at common law. The form of the questions shews this; and the jury were very plainly told that the 7th question involved inspection of Jeffers' work as well as any general inspection of the locomotive; they were told that the 7th question involved this: "Was the system of inspection of the work of their employee who put this pipe in originally"—Jeffers—"or of the condition of the locomotive from time to time afterwards until the accident occurred such as in your opinion constituted a discharge of the duty which the employers owed to the deceased of maintaining the machinery and plant in a reasonably safe condition?" And, he pointed out the difference in amounts which might be awarded for a liability at common law and under the statute, and the way by which they might choose between the two, and give effect by their findings to the greater claim. And so intent upon doing that, they seem to have been, that instead of merely answering the 7th and following questions in the plaintiff's favour, they duplicated such findings in answer to some of the earlier and inappropriate questions; so that we have the somewhat incongruous findings, that there was a defect in the locomotive, caused by the want of inspection, or, to use the jury's own words, "occurred by the defendants not supplying proper inspection;" the jury probably

C. A.  
1906  
—  
SCHWOOB  
v.  
MICHIGAN  
CENTRAL  
R.W.Co.  
—  
Meredith, J.A.

meaning that there was a defect which ought to have been discovered and remedied through proper inspection. The obvious purpose of the 2nd question was to find out the nature of the defect referred to in the 1st question and the answer to it, and the answer to the following four questions negative any claim that the negligence of Jeffers, or of any servant of the defendants, was the cause of the accident, the jury being set on finding direct liability so as to be able to award damages at common law.

When they returned with their verdict to that effect, and having given an answer to every question, the trial Judge then, doubtless finding the questions unexpectedly answered, proceeded to question the jury as to negligence on the part of Jeffers—the propriety of which I am doubtful, especially as the further questions asked were incomplete and obviously insufficient to support any verdict—and they answered that Jeffers had been negligent, but still clung to their finding that the defendants directly caused the accident by want of proper inspection; thus: “Yes, my Lord, and we think there should have been *some proper inspection* that would have discovered *that which would have made the company responsible.*” The after-thought questions seem then to have been put in writing and so answered; but how and when is not shewn by the notes of the trial; and here again the jury persist in their finding of liability by reason of want of proper inspection. These questions and the answers to them are as follows:—

“Q. Was there any defect in the way the tube in question was fixed in the boiler by Thomas Jeffers at the time it was put in? A. Yes, and at the time we think there should have been proper inspection.

“Q. If you find there was a defect in the way in which Jeffers put the tube in, what was that defect? A. It was not properly belled.

“Q. Are you of the opinion that proper inspection would have revealed that defect? A. Yes.

“Q. At what amount do you assess the damages if it should be held that the plaintiff is only entitled to recover under the Workmen’s Compensation Act? A. \$3,240.”

It is quite plain, therefore, that the jury have found that the proximate cause of the accident was the want of proper inspection only, and that if the judgment cannot be supported on that ground



it cannot be supported at all, (1) because there is no finding of any sort by the jury that the negligence of Jeffers was either proximately or remotely the cause of the accident (none of the after-thought questions touched that point), and (2) it was negatived by the answers to the questions first submitted. It was expressly covered by questions 3 and 4, and negatived by the answers to these questions, the jury saying "answered by 2," that is, that the cause of the accident was there given; and (3) because of the jury's persistent findings that the cause of the accident was want of inspection. We cannot add to the jury's findings, and we certainly cannot add to it something inconsistent with them, namely, that the proximate cause of the accident was not want of inspection but was Jeffers' negligence in belling the tube; they shewed too plainly and persistently their intention that the plaintiff should recover at common law, and that they would not have found any facts to create the lesser liability, unless they had been told that it was the half loaf or nothing at all, and they were told anything but that.

Then can the judgment be supported on the findings of want of proper inspection? In the first place it may be observed that no indication is given of the character of the lacking inspection, whether it was inspection of Jeffers' work before letting it go out, or other general inspection of the locomotive from time to time with a view to preventing accidents and remedying defects, or inspection of any other general or particular character. Question 8, which was directed plainly to this point, is substantially unanswered; to say that neglect to provide a proper system of inspection consisted in "not providing proper inspection" is not very enlightening. To one of the supplemental questions the answer was given that inspection would have revealed the insufficient belling of the tube, but that reveals little, if any, information as to the nature of the inspection which the jury found to have been wanting and to have caused the accident.

I am of opinion that there is no evidence to support the finding of negligence on the part of the defendants in not providing proper inspection, whatever the character of the inspection. There was nothing to shew that their shops and their works were insufficiently or inefficiently manned or operated, or that they did not take all of the usual precautions taken by companies such as they are, or by others in any way like them, but the contrary. This particular

C. A.

1906

SCHWOOB

v.

MICHIGAN

CENTRAL

R. W. Co.

Meredith, J. A.



C. A.

1906

SCHWOOB

v.

MICHIGAN

CENTRAL

R. W. Co.

Meredith, J. A.

locomotive seems to have been cared for with even more than an ordinary amount of cleaning and examination, apart from that examination and care which the engineer and fireman ought to have bestowed upon it; so that unless jurors are permitted to lay down new methods of conducting great undertakings and operations about which they can hardly know anything, and in regard to which there is no evidence, this verdict cannot be given effect to. It has been said that the cobbler should stick to his last, and with quite as much force it might be said that neither Judges nor jurors should lay down rules altering the usual and approved method of carrying on the business of great undertakings, such as that in question, requiring new "systems of inspection" or other notions, to support a claim for damages. It was the jury's duty to find whether the accident was caused by any negligence of the defendants or any of their servants, and if so, what that negligence was. To say whether Jeffers was negligent, not to say that the defendants should or should not have had an inspector over him, and so, logically, over each of its thousands of workmen, and that no work of any of them should go into use until passed by an inspector. That no matter how skilled or how careful the workman or other servant, and no matter what his position, his work must be overseen by some "inspector." If, instead of employing the competent man which Jeffers is proved to have been, an incompetent man had been employed, and if his incompetence had caused the accident, a good cause of action would have arisen from negligence in the employment of incompetent servants, not from want of inspection. If a competent man such as Jeffers should negligently perform his work, as sometimes the most competent may, and if injury were caused by that negligence, an action would lie against him, and, under certain circumstances, against his employers; not on the ground of defective systems of inspection or want of proper inspection, but on the act of negligence itself. So, too, if there were negligence on the part of anyone concerned in the care of the engine.

Shortly stated my opinion is: (1) that the judgment cannot stand, because the finding as to "not providing proper inspection," is, (a), too indefinite, and (b) unsupported by any reasonable evidence; (2) that it cannot be supported at common law on the negligence of Jeffers, because (a) there is no finding that such negligence was the proximate cause of the accident, but there is at

least an implied finding to the contrary; and because (b) the question of common employment was not presented and dealt with at the trial; nor is there any reasonable ground for the contention, now for the first time made, that the case was not one of common employment; and (3) that no judgment can be entered for the plaintiff under the statute without usurping the functions of the jury, because (a) there is no finding by them that Jeffers's negligence was the proximate cause of the accident, and there is, by implication, a finding that it was not; and because (b) there is no finding that Jeffers was a person entrusted by the defendants with the duty of seeing that the condition of the machinery was proper. There was nothing like an admission, by the defendants, in any shape or form, which would supply the want of any such findings.

A judgment on any common law liability, therefore, cannot be sustained; and there are no findings sufficient to support a judgment under the Workmen's Compensation for Injuries Act. Indeed, such a judgment would be contrary to the findings, and the several times expressed determination of the jury. In my opinion, the defendants, therefore, as the case stands, are entitled to the judgment; but the case is a proper one for the exercise of the discretionary power to grant a new trial on the question of liability under the Act only, and that should be done.

G. F. H.

C. A.

1906

SCHWOOB

v.

MICHIGAN

CENTRAL

R.W.Co.

Meredith J.A.

## [IN THE COURT OF APPEAL].

C. A.

1907

Jan. 28.

HANLY ET AL. V. MICHIGAN CENTRAL R.W. CO.

*Railway—Injury to Person at Highway Crossing—Negligence—Findings of Jury—Train “behind Time”—Dominion Railway Act, 1903, sec. 215.*

In an action to recover damages for the death of a man who was struck by a train of the defendants at a highway crossing, the evidence as to whether the statutory signals were given was conflicting, and, while it was shewn that the train was about ten minutes late, there was no evidence as to the cause of the delay, nor was it shewn that the deceased was misled thereby. The jury found that the defendants were guilty of negligence, which consisted in the train being “behind time;” but they did not answer a question put to them as to whether the bell was ringing:—

*Held*, that no actionable negligence was shewn or found, and the action should be dismissed; it was not a case for a new trial.

Section 215 of the Dominion Railway Act, 1903, which requires that all regular trains shall be started as nearly as practicable at regular hours, fixed by public notice, did not aid the plaintiffs.

Judgment of Boyd, C., reversed.

AN appeal by the defendants from the judgment of Boyd, C., at the trial, upon the findings of a jury, in favour of the plaintiffs.

The action was brought by Maria Hanly, the widow, and Lorena Hanly and others, the infant children, of James Hanly, deceased, by the said Maria Hanly, their next friend, and by the latter as administratrix of the estate of James Hanly, to recover damages for his death by the alleged negligence of the defendants, and also the value of a pair of horses and a waggon killed and destroyed at the time of the injury which caused the death.

The plaintiffs, by the statement of claim, alleged: (2) that on or about the 9th March, 1905, James Hanly was driving with his team and lumber waggon along a public highway in the township of Sandwich South, in the county of Essex, known as the Fifth Concession road in the said township, and being his usual route in going to and returning from the city of Windsor to his then home on the south-west quarter of lot 14 in the 6th concession of the said township, and in so driving on and along said highway he was obliged, in the performance of his ordinary work and business affairs, to cross the defendants' line of railway, at its junction with the said highway, and in crossing the said line of railway he and horses and waggon were struck by a locomotive engine of the defendants, which was passing and being operated by them on the railway; (3) that by reason of the construction of the defen-

dants' line of railway at the point or crossing in question, it is a dangerous crossing and a place where accidents are likely to happen, and it was impossible for the deceased to hear and get a view of the engine or to avoid it, in the circumstances, as it was approaching the crossing going west, and by reason of the darkness of the night in question and of the running of the engine at too high or fast a rate of speed, in order to make up time, being then running behind its schedule time, and by reason of the passing at the said crossing of another locomotive engine and train of cars, going east, a few minutes before, and by reason of the negligence of the defendants' employees in control of the locomotive engine in omitting to ring the bell or blow the whistle on the engine as it was approaching the crossing, the deceased drove on to the track of the defendants' railway, when he was struck by the locomotive engine, and was so hurt and injured that he died a few hours thereafter, and the horses, harness, and waggon of the deceased were killed and destroyed, by reason of all of which the plaintiffs had sustained damages.

The defendants pleaded "not guilty by statute," referring to 31 Vict. ch. 14, secs. 1, 2, 3, 17 (O.); 37 Vict. ch. 68, secs. 1, 2, 3 (D.); 57 & 58 Vict. ch. 66, sec. 1 (D.); 3 Edw. VII. ch. 58, secs. 1, 2, 3, 6, 118, 120, 242 (D.)

The questions submitted to the jury and their answers were as follows:—

Q. 1. Was Hanly killed as the result of his own carelessness?  
A. No.

Q. 2. Was he killed by the negligence of the railway? A. Yes.

Q. 3. If so, what was the negligence? A. Behind time.

Q. 4. Could Hanly, by the exercise of reasonable care, have avoided being killed by the train? A. No; because his attention would naturally be on the east-bound train, being the west-bound train was past due.

Q. 5. Do you find the bell was ringing continuously, as the defendants' witnesses say? (Not answered.)

Q. 6. If you think damages should be paid by the railway, how much? A. \$3,950.

Judgment was entered for the plaintiffs for that amount, with costs.

C. A.

1907

HANLY

v.

MICHIGAN  
CENTRAL  
R.W.Co.



C. A.

1907

HANLY

v.

MICHIGAN

CENTRAL

R.W.Co.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A., on the 22nd and 23rd January, 1907.

*I. F. Hellmuth*, K.C., and *E. C. Cattanach*, for the defendants, appellants. There was no evidence upon which a jury could have properly found that there was any neglect of duty on the part of the defendants, and the defendants' motion for a nonsuit should have been granted. Even assuming negligence on the part of the defendants, the evidence shews that the injury was caused solely by the negligence of the deceased, and no amount of care on the part of the defendants could have prevented the accident. The answers of the jury disclose no negligence on the part of the defendants, and are insufficient in themselves to warrant a judgment against the defendants. The absence of a finding in answer to the question as to the bell being kept ringing is equivalent to a finding in the defendants' favour: *Andreas v. Canadian Pacific R.W. Co.* (1905), 37 S.C.R. 1. There is no negligence in being behind time. The damages were excessive. No evidence was given by the plaintiffs of the income or earning power of the deceased, or of any pecuniary damages sustained by them in consequence of the death. See *Jennings v. Grand Trunk R.W. Co.* (1888), 13 App. Cas. 800.

*S. White* and *E. Meek*, for the plaintiffs, respondents. The evidence shews that the defendants were wholly to blame for the death, and the answers of the jury, when all read together, are sufficient to warrant the judgment. The jury have found negligence, and, as the evidence shews that the crossing was a dangerous one, and the train was going at a high speed, it must be taken that the jury meant that it was negligent to run in that way, when behind time, in passing a dangerous crossing. *Misener v. Wabash R.W. Co.* (1906), 12 O.L.R. 71, affirmed by the Supreme Court of Canada, is very like this case; see also *Johnson v. Grand Trunk R.W. Co.* (1894), 21 A. R. 408; *Vallee v. Grand Trunk R.W. Co.* (1901), 1 O.L.R. 224; *Beckett v. Grand Trunk R.W. Co.* (1886), 13 A.R. 174; *Hollinger v. Canadian Pacific R.W. Co.* (1892), 21 O.R. 705. By sec. 215 of the Dominion Railway Act, 1903, trains shall be run at regular hours fixed by public notice. The time-table is the notice. It is for the defendants to explain the delay. See also secs. 213 and 224 of the Act. Even if the precautions prescribed by the Act are observed, extra precautions should be taken

at a dangerous crossing with a late train : *Lake Erie and Detroit River R.W. Co. v. Barclay* (1900), 30 S.C.R. 360; *Canadian Pacific R.W. Co. v. Fleming* (1893), 22 S.C.R. 33; *Peart v. Grand Trunk R.W. Co.* (1886), 10 O.L.R. 753 (Appendix); *Grand Trunk R.W. Co. v. Hainer* (1905), 36 S.C.R. 180. The amount of the verdict is reasonable: see *Schwoob v. Michigan Central R.W. Co.* (1906), ante 548. There is no reason why the judgment should be disturbed, but if it is there should be a new trial.

*Hellmuth*, in reply. As to extra precautions, see *Grand Trunk R.W. Co. v. McKay* (1903), 34 S. C. R. 81.

January 28. OSLER, J.A.:—The negligence charged in the statement of claim is that the defendants' servants in charge of the train which killed the plaintiff Maria Hanly's husband and his horses, omitted to give the statutory warnings before coming to the crossing where the collision took place. It is also alleged, though not charged as negligence, that the engine "was running at too fast or too high a rate of speed in order to make up time, being then running behind its schedule time."

As to the omission to ring the bell or blow the whistle, while the evidence was conflicting, the weight of it was entirely in the defendants' favour. As to the rate of speed and the train being behind time at the crossing in question, it was shewn that the rate was the usual one, and that the train was about ten minutes behind time. The jury did not answer the questions put to them as to the former, but, in answer to other questions, found that the deceased was killed by the negligence of the railway company, and that (such negligence consisted in the train being) "behind time." They assessed the damages at \$3,950. There was evidence that the team of horses killed by the collision was worth \$300, but there was no direct evidence of any pecuniary loss to the plaintiffs beyond the facts that the deceased was a man of about 45 years of age and a farmer, nor does it appear how much was allowed for the horses and how much in respect of the other cause of action.

It appears to me, upon the whole case, that the appeal must be allowed, on the ground that no actionable negligence has been found by the jury. Section 215 of the Railway Act, 3 Edw. VII. ch. 58 (D.), requires that all regular trains shall be started and run

C. A.  
1907  
HANLY  
v.  
MICHIGAN  
CENTRAL  
R.W.Co.

C. A.

1907

HANLY

v.

MICHIGAN  
CENTRAL  
R.W.Co.

Osler, J.A.

as nearly as practicable at regular hours, fixed by public notice. This provision was probably enacted in the interest of passengers or persons using the railway, and not of persons using the highways crossed by the railway, who are supposed to be sufficiently protected by the statutory warnings required to be given of the approach of the train. But, even if the latter may invoke the section, much more would be necessary to prove negligence than the mere fact that the train was late and did not pass the given point at the scheduled time. No doubt, if it had done so, the deceased would not have been there, and the accident would not have happened. But the regularity to be observed is only that which is from time to time practicable under all the circumstances, and, if the section is applicable at all in such an action as the present, it would certainly have to be proved, in order to fasten upon the defendants liability for negligence, not only that the delay was a negligent delay, but also that the deceased had in some way been misled by the defendants into supposing that no train was coming, and, therefore, "might go over the crossing in safety without taking the precaution of looking up and down the line or any other such precaution as might be otherwise necessary:" *Smith v. South Eastern R.W. Co.*, [1896] 1 Q.B. 178. There is an entire absence of any evidence of this kind, and, therefore, the action fails, on the plain ground that the plaintiff has not proved that the negligence of the defendants caused the death of the deceased.

The evidence of failure to give either of the statutory warnings was conflicting, and the weight of evidence is against the plaintiff's contention on that point—a fact which quite accounts for the omission of the jury to answer the question by which their attention was specially directed to it as the ground of negligence prominently put forward and mainly relied upon at the trial. If we could see that the consideration of this had been merely overlooked by the jury, we might think it right to direct a new trial, as was done in the case of *Cobban v. Canadian Pacific R.W. Co.* (1896), 23 A.R. 115. But I can see nothing in the case which would justify this course in being taken.

There are many other difficulties in the plaintiffs' way, which would have made a new trial necessary, even if the answers of the jury had disclosed a finding of actionable negligence, but these it



is not necessary to deal with, as the action must be dismissed on the ground already mentioned.

Appeal allowed, and action dismissed, with costs if demanded.

MOSS, C.J.O., GARROW and MACLAREN, JJ.A., concurred.

C. A.

1907

HANLY  
v.

MICHIGAN  
CENTRAL  
R.W.Co.

Meredith, J.A.

MEREDITH, J.A.:—It seems extraordinary, to me, that it could be seriously contended that any judgment for the plaintiffs can be supported on the findings of the jury in this case.

The findings are, that Hanly was killed "by the negligence of the railway" in being "behind time." Hanly was killed by a passing train at a level crossing of the railway on a public highway in the country, miles away from any station. It is surely almost farcical to assert, in these circumstances, that any actionable negligence on the part of the defendants was the proximate cause of his death. There was no time fixed at which this or any other train should pass over this, or any other, highway. Times are fixed, by public notice, for the departure of certain trains from certain stations, and sometimes for their arrival at certain stations. The most that can be said of the train in question is that it would probably have been a few minutes late upon its arrival at its next stopping place—Windsor; so that the contention for the plaintiffs amounts to this, that the defendants are liable in this action because the train in question might have been, and probably would have been, a very few minutes late in arriving at Windsor. A train may leave one stopping place at the moment of its fixed time, it may before crossing any highway be unavoidably, or negligently, delayed many minutes, and yet may arrive at and depart from its next stopping place at the fixed time to the moment. There is not a particle of evidence that any delay of the train was caused by any sort of negligence on the part of the defendants or any of their servants; on the contrary, the evidence shews that the crew of the train were doing all that could be done to arrive at and depart from Windsor in time. So that the contention comes to this, that every train, having fixed regular hours of starting and running, must be treated as an unlawful thing, a trespasser, in crossing highways, while running between stations, unable, or unlikely, to reach the next stopping place in time, no matter what may be the cause of its being late.



C. A.  
1907

HANLY  
v.  
MICHIGAN  
CENTRAL  
R.W.Co.  
—  
Meredith, J.A.

The defendants owed no duty to Hanly to cross the highway in question at any particular second, minute, or hour with this particular train, or any other; and the fact that it did not pass at such a second, minute, or hour, was not the proximate cause of his death. If it had passed a minute before or a minute later, and if he had not been upon the track then, he would not have been killed by that particular train; but he might have been killed by some other train, upon the same railway, at the same place; they were passing frequently throughout the day and the night. If he had not been out so late that night; if he had not lived in a place which necessitated his crossing the track; and, indeed, if he had not been born, the accident would not have happened; but these things are all alike more or less remote from the proximate cause of the accident, though without them, and hundreds others, it could not have happened. A *sine quâ non* may be very far removed from the cause of an accident.

Section 215 of the Railway Act, 1903, affords the plaintiffs no aid. It is in these words: "All regular trains shall be started and run, as near as practicable, at regular hours, fixed by public notice;" and is not a new enactment. Whatever may be its effect in regard to persons more or less directly concerned in, and affected by, the regular arrival and departure of trains, it creates no duty on the part of a railway company towards persons merely crossing its railway, upon a highway: see *Philadelphia, etc., R. Co. v. Spearen* (1864), 47 Penn. St. 300, and *East Tennessee, etc., R. Co. v. Winters* (1886), 85 Tenn. 240. But, if it did create any such duty, there is no sort of evidence that its provisions were not complied with. It can hardly be said that a train which may be a few minutes late after a run of about 200 miles, and possibly 600 miles, is not running at regular hours; it may very well have left Windsor in time to a moment; and there was no attempt made to shew that it was not so running "as far as practicable." There would be no great cause for complaint if all trains were as punctual. And, in addition to all this, if the train had been keeping ever so irregular hours, that would not have been the proximate cause of the accident.

It is obvious that the fact of a train arriving, or passing, at an unusual and unexpected time, may be more or less material on a question of contributory negligence; but it is more obvious that it could not in such a case as this create a cause of action such as this.

But it was said that there should be a new trial because the question as to the ringing of the bell was not answered by the jury. Nothing was said at the trial as to that. If an answer should have been given, then was the time to raise the question, for then the jury could have been required to answer. The question, however, ought not to have been asked; and was, not improperly, left unanswered. Asking it was but repeating a question already asked, or, rather, one which must be covered, so far as material to the rights of the parties, in the answers to questions already asked. If the jury found negligence in regard to the statutory requirement as to ringing the bell, and also found that that negligence was the cause of the accident, they would have said so in answer to the second and third questions. The jury's attention was, of course, pointedly called to this ground of negligence during the trial and in the Judge's charge. It was, therefore, superfluous, and apt to be embarrassing. It was also useless without the complementary question, was such negligence the proximate cause of the accident? and also, in a sense, incomplete, as it did not include the sounding of the whistle. If the question had been answered in the negative, that would have availed the plaintiffs nothing, for the earlier answer shewed that that negligence was not, but that something else was, the proximate cause of the accident. The jury seem to have taken an intelligent view of the matter, and having, by their findings and answers as to the earlier questions, made that question immaterial, very properly abstained from answering it; and in that the learned trial Judge seems to have agreed with them, for otherwise he would have required them to answer the question: see *Schwob v. Michigan Central R.W. Co.*, ante 548, and *Wilson v. Hamilton Steel and Iron Co.* (1906), not yet reported.\*

Again, an appeal was made to the discretion of the Court to grant a new trial. That is a power which certainly exists, but, it is equally certain, is one which can but very seldom be properly exercised. The cases are few indeed which are not within the rule that a verdict once found ought to stand. What reason can there be for seeking it? Only one: that a new jury, finding that "behind time" will not support a judgment in the plaintiffs' favour, may find that the bell did not ring or that the whistle did not sound, and that such

C. A.  
1907

HANLY  
v.

MICHIGAN  
CENTRAL  
R. W. Co.

Meredith, J. A.

\* This case will not be reported; it is noted in 8 O.W.R. 525.

C. A.

1907

HANLY

v.

MICHIGAN

CENTRAL

R. W. Co.

Meredith, J. A.

neglect was the proximate cause of the accident; and so, and for such purpose, reverse the findings of the jury now in question. That cannot be in the interests of justice. If it appeared that the plaintiffs have a good cause of action, which has failed through some mistake, a new trial might well be granted; but the weight of the evidence is very much against their claim, and so to give them another chance, after the education which the trial had, and this appeal, affords them, would be manifestly unjust to the defendants, who have fairly succeeded, and are entitled to the judgment.

E. B. B.

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[IN THE COURT OF APPEAL.]

LOVELL V. LOVELL.

C. A.

1906

Nov. 3.

*Husband and wife—Alimony—Wife leaving husband—Justification—Legal cruelty—What constitutes—Acts affecting mental condition.*

Legal cruelty, as regards the conjugal relationship, does not necessarily depend on physical acts or threats of violence, but may arise from acts or conduct operating entirely upon the mental condition of the aggrieved person.

Where therefore such a course of harsh conduct, treatment and intimidation on the husband's part towards his wife, a woman of delicate constitution, created such mental distress as was sufficient to, and did impair her health; and where his language of threats and menace, and his habitual demeanor, were such as to create a well founded apprehension that the wife would suffer worse and more injurious treatment and hardship if she did not submit implicitly and submissively to anything the husband might choose to say or do:—

*Held*, that there was such matrimonial cruelty shewn as justified the wife leaving her husband, and entitled her to a judgment for alimony.

Judgment of the Divisional Court, 11 O.L.R. 547, affirmed. MEREDITH, J.A., dissenting.

THIS was an appeal by the defendant from the judgment of the Divisional Court affirming the judgments of Boyd, C., declaring the plaintiff was entitled to alimony. The judgments are reported 11 O.L.R. 547, where the facts and arguments are fully stated.

On 9th, 10th and 11th May, 1906, the appeal was heard before MOSS, C.J.O., OSLER, GARROW, MACLAREN and MEREDITH, J.J.A.

*G. H. Watson*, K.C., and *W. W. Denison*, for the appellant.

*J. King*, K.C., for the respondent.

November 3. MOSS, C.J.O.:—The plaintiff claims alimony from her husband the defendant, alleging ill-treatment, threats and neglect, causing her to become so broken down in health that she is unable to live under the strain, worry and privations caused by the defendant without great danger to her health and life—in short, that he has been guilty of legal cruelty. No actual physical violence is alleged or shewn, nor as the record now stands, is adultery charged.

By sec. 34 of the Judicature Act it is enacted that "the High Court shall have jurisdiction to grant alimony . . . to any wife



C. A.  
1906

LOVELL  
v.  
LOVELL.

MOSS, C.J.O.

who would be entitled by the law of England to a divorce and to alimony as incident thereto."

The question is whether the plaintiff has established a case of cruelty apart from actual violence or adultery sufficient to entitle her to a judgment for alimony.

A great deal of testimony has been taken and the greater part of the conjugal life of the parties has been exposed. The learned Chancellor who tried the case in the first instance, after hearing the evidence, and after, as he says, the most anxious and serious consideration, came to the conclusion that there had been such a course of conduct on the part of the defendant as to justify the plaintiff in refusing to live longer with him, because to continue to do so would be to permanently injure and affect her bodily health and seriously endanger her mental balance. A Divisional Court affirmed the decision, the late Mr. Justice Street dissenting, and the defendant has appealed.

Throughout the case it has been strenuously argued for the defendant that, according to the law of England, there can be no cruelty sufficient to entitle a wife to a divorce and alimony as incident thereto unless there is shewn, danger to life, limb or health, bodily or mentally, or a reasonable apprehension of it; and that the danger must be founded on some physical facts, such as actual violence or threats of violence, leading to an apprehension that, if continued, danger to life, limb or health will ensue, or to an apprehension that the fear of the continuance of such a course of conduct will affect the health and bring about serious bodily and mental suffering to such an extent as to incapacitate the spouse so affected for the performance of the duties of the marital state. But the decisions, many of which have been referred to and discussed in the judgments in the Courts below, do not so confine the definition of legal cruelty. And while it is recognized that violence and personal danger are far the most common ground, the cases do not rest there. They shew that in a proper case relief will be given where there is no personal violence and no threats of it, but where there is conduct of such a kind as to undermine health. No doubt such cases are comparatively rare and should be admitted with great caution. But that the law recognizes them, and is prepared to give relief where the facts justify it, is beyond question. It is said that by the decision arrived at in *Russell v. Russell* [1895]

P. 315, and [1897] A.C. 395, the definition of legal cruelty has been limited to cases of violence, actual or threatened, and the mental effects thereby produced. The actual decision in that case was that Earl Russell's bodily or mental health had not in fact been affected by the charge against him made and persisted in by his wife, odious and abominable though it was; but even the absence of this element was not, in the opinion of Rigby, L.J., in the Court of Appeal, and Lord Halsbury, L.C., and Lords Hobhouse, Ashbourne and Morris, in the House of Lords, a sufficient reason for withholding relief. And the speeches of the majority of the Lords do not shew that they intended to affirm the proposition that the test of injury to health, or a reasonable apprehension thereof, is confined to fears occasioned by actual violence, bodily hurt or threats thereof. This is manifest from the observations of Lord Shand, at p. 463, and of Lord Davey, at p. 467. The case is not to be taken as overruling the numerous cases preceding it which recognize the propriety of relief in cases of cruelty not dependent on violence, actual or threatened.

The present case then resolves itself into a question on the facts whether the plaintiff has shewn that the defendant has subjected her to treatment likely to produce, and which did produce, physical illness and mental distress of a nature calculated to permanently affect her bodily health and endanger her reason, and that there is a reasonable apprehension that the same state of things would continue.

It is shewn that at the time of the marriage the plaintiff, though somewhat delicate and predisposed to weakness of the back, was otherwise in good health and of a cheerful, pleasant disposition. It is shewn that up to the time when they gave up housekeeping and went to live at a boarding house, although there had been differences between them and some indefensible acts on the part of the defendant, such as the introduction of his mother and sister into the household in violation of his solemn promise not to do so; his insistence upon the separation of the plaintiff and her child in the summer of 1902 while she was at the Island; his refusal to permit the plaintiff to take the child with her on a contemplated trip to the South, thereby putting an end to the trip; his refusal to engage a nurse for the plaintiff and her child at a time when both were ill, and his threats to remove the child from her because she

C. A.

1906

LOVELL

v.

LOVELL.

Moss, C.J.O.

C. A.  
1906  
LOVELL  
v.  
LOVELL.  
—  
MOSS, C.J.O.

was unfit to be entrusted with his care they had lived on comparatively affectionate terms. At the time when the plaintiff left the boarding house on the 23rd of January, 1904, and went to her father's house, the evidence shews her to have been in a very serious condition both physically and mentally. She was weak and ill, nervous and depressed, so much so that her father and others feared that her mind was going. Her father says she was much worse, more excited, in January, 1904, than in May, 1903; she was almost a wreck, she could hardly stand alone; he could see that her mind was going and that her constitution was breaking down. And her mother and sister observed the same things and shared his apprehension. That their fears were not imaginary or unfounded appears from the testimony of Dr. Musgrave, who describes her condition at the time when she went to her father's house. He says that she was in a very nervous, almost breakdown condition, physically and mentally, chiefly mental in nervous system. Harshness and ill-treatment in her case would so affect her system as to lead to a breakdown finally, and she was afraid of the defendant and in dread of living alone with him. And when, while in this state of collapse, she was suddenly informed by the defendant that he had, without consultation with her, rented a house, and that he desired her to immediately get ready to go there with him, but that none of her friends were to be permitted to go to see her, she felt afraid to go, and told him so. He did not endeavour to reassure her or remove her fears, but repeated his command.

There can be no doubt that her health, physical and mental, was in a very critical state, and that a continuance of the then conditions would have led almost inevitably to the most serious, if not fatal, consequences.

To what causes is this marked and serious change to be attributed?

The evidence must be regarded as a whole. The nature of the case does not permit of a separation of the incidents and an inquiry, whether taken singly there is conduct amounting to cruelty. Rather the questions are whether upon the whole of the facts shewn there is not disclosed that the defendant's conduct was responsible for the plaintiff's condition, and whether it was not reasonable to conclude that it was likely to be continued, and whether, if con-



tinued, it was not altogether probable that it would entail the gravest consequences to the plaintiff.

A perusal of the testimony leads to the conviction that the learned Chancellor reached a proper conclusion as regards these questions. Testimony outside of that of the plaintiff's family shews that after the removal to the boarding house there was a marked change in the defendant's attitude towards and treatment of the plaintiff, and for this he attempts no explanation, but contents himself with general denials. These, however, cannot be accepted in the face of independent testimony supporting the plaintiff's statements. There is a marked contrast between the plaintiff's manner of testifying and that of the defendant, which justified the learned Chancellor in accepting her testimony upon any disputed point in preference to the defendant's. One cannot fail to note the candid and unguarded way in which the plaintiff gave her evidence, speaking without any reserve or apparent care as to its effect, in contrast with the defendant's studied, evasive and elusive methods, so that even reading his testimony one can well understand how disinclined the learned Chancellor on hearing it must have been to attach weight to it, much less to accept it as against the plaintiff's, corroborated as the latter was in so many material particulars.

The plaintiff's conduct in making notes of some of the defendant's sayings and doings has been commented on; but this, though a practice not to be commended, as she candidly admits, is satisfactorily explained. The defendant had made use of language implying that she was unfit to have the care of her child, and claimed the right, and threatened to exercise it, of taking him from her custody and care. She was afraid he would attempt to carry out his threat, and she did not know what he would do, and she noted what he said and did in order to prepare in case he took action. His frequent hints and threats concerning the child and his removal from her custody were a great source of disquietude and unhappiness to her, and it undoubtedly preyed upon her mind and had its part in bringing about the final unhappy condition into which their marital relations drifted.

It would serve no useful purpose to go over in detail the whole of the evidence. Suffice it to say that it amply supports the learned Chancellor's findings summarized at pp. 550-56 of the case. At the latter page, after saying that he adopts the language of Lord

C. A.

1906

LOVELL

v.

LOVELL.

Moss, C.J.O.



C. A.

1906

LOVELL

v.

LOVELL.

MOSS, C.J.O.

Watson in *Mackenzie v. Mackenzie*, [1895] A.C. 384, he continues: "But I go further, and I find that all the circumstances, the most important of which I have detailed, shew a persistent course of conduct on the husband's part which created mental distress sufficient to impair her health, and which did in fact injure it appreciably during their married life together, and that his language of threat and menace, and his habitual demeanour, were such as to create a well founded apprehension that she would suffer worse and more injurious treatment and hardship, if she did not submit implicitly and submissively to anything he might choose to do or say were she to live with him in the future."

To refuse the plaintiff relief is to condemn her to return to the life thus depicted. If that is to be her lot the ultimate outcome can readily be foretold.

But the plaintiff has established such a case of harsh treatment, threats and intimidation, producing all the effects described by the learned Chancellor, as to bring it well within the definition of cruelty occasioning injury to health, and there being danger of the same line of conduct continuing, the case is one for the intervention of the Court for the plaintiff's protection.

Emphasis has been laid on the learned Chancellor's well intensioned attempt to bring about a reconciliation and the plaintiff's refusal to accept his recommendation. But the very fact that the plaintiff after hearing his strong appeal, and after a night's reflection, was unable to nerve herself to undergo the risk of resuming life with the defendant, feeling and knowing that she was unable to place any reliance on the sincerity of his promises, must have strongly impressed the learned Chancellor, as it cannot fail to impress every one, with the reality of her experiences and the strength of her apprehensions.

The appeal must be dismissed with costs.

OSLER, J.A.:—Upon the most careful examination which I have been able to give to the evidence and the authorities cited, my conclusion is that the judgment of the learned Chancellor is right for the reasons given by him. I think the appeal should be dismissed.

GARROW, J.A.:—This is an appeal by the defendants from the judgment of a Divisional Court affirming the judgment at the trial of the Chancellor in favour of the plaintiff.

The action was brought to recover alimony. The facts are very fully set forth in the several judgments below, now reported in 11 O.L.R. 547.

On the argument before us counsel for the defendant, besides relying on the view of the facts presented by Street, J., in his dissenting judgment, contended that as a matter of law matrimonial cruelty necessarily involved as one of its vital ingredients physical violence, actual or threatened.

As to the facts, I think we should accept the conclusions of the learned Chancellor before whom the parties were both examined at great length. He was in a much better position than we are, sitting in appeal, to judge not merely of the truth of the story as told by the plaintiff, but of the probable effect upon her of the alleged acts of cruelty committed by the defendant.

Much must depend upon the individuality of the parties. Conduct which would in one case be very palpable cruelty might as between other parties differently organized fall far short of the standard upon which the Court should act.

For the legal proposition the learned counsel relied upon the language of Lord Herschell in the case of *Russell v. Russell*, [1897] A.C., 395 at p. 456, which reads as follows: "Upon a review of the authorities prior to the time when the Divorce Act came into operation, I think it may confidently be asserted that in not a single case was a divorce on the ground of cruelty granted unless there had been bodily hurt or injury to health, or a reasonable apprehension of one or the other of these." But Lord Herschell did not, I think, intend to confine the second branch of his proposition, *i.e.*, the injury to health, to an injury proceeding only from physical violence, actual or threatened.

The result of the case in the House of Lords was to affirm the judgment of the Court of Appeal reported in [1895] P. 315. And the proposition so affirmed was simply this: "We define it" (legal cruelty) "thus: There must be danger to life, limb, or health, *bodily or mental*, or a reasonable apprehension of it, to constitute legal cruelty:" *per* Lopes, L.J., at p. 322. In the House of Lords, Lord Shand, concurring with the judgment of Lord Herschell,

C. A.

1906

LOVELL

v.

LOVELL.

Garrow, J.A.

C. A.  
1906  
LOVELL  
v.  
LOVELL.  
Garrow, J.A.

says: "Where however the criterion came to be stated in the determination of the merits of the cases, having regard to the facts in evidence, that criterion was danger or apprehension of danger to life or health,—which it must be observed, with reference to much of the argument for the appellant is a much more comprehensive term than *physical violence*, and a term which has, I think, been found sufficient to cover all the cases in which hitherto relief has been granted": p. 463. And Lord Davey, also concurring, says: "There is no question here of *personal violence*, and in the circumstances of the case *I see no evidence* of any apprehended injury to the appellant's physical or *mental* health against which he requires protection": p. 468. See also *Kelly v. Kelly* (1869), L.R. 2 P. & M. 31, (1870) 59; *Mackenzie v. Mackenzie*, [1895] A.C., 384.

From these authorities it may, I think, be safely asserted that legal cruelty does not necessarily depend upon physical violence or threat of violence, but may arise from acts or conduct operating entirely upon the mental system of the spouse complaining.

For these reasons, I think, the appeal fails and should be dismissed with costs.

MACLAREN, J.J.A., concurred.

MEREDITH, J.A.:—The plaintiff is seeking from her husband that which is tantamount to a divorce *a mensâ et thoro*, with an allowance for her separate maintenance, and the custody of their one child, with an allowance to her for his maintenance and education. That is, that the husband be, by the judgment of the Court, deprived of all his substantial rights under their marriage contract, and also be put to great pecuniary liability; deprived not only of the help, society and comfort which a man should have from his wife, but also of the pleasure and pride of bringing up his own son, and obliged to keep them in idleness, without any substantial control over them.

It should go without saying that such relief should not be awarded except for the gravest of reasons; that such grave consequences should follow only corresponding grave wrong-doing.

It is against the moral, as well as against the material, interests of the wife, and also of the husband, in many respects more so than a divorce *vinculo matrimonii*; it is against the moral and material welfare of the child; and against the interests of the community in

which they reside; as well as against the interests of the state. These are facts plainly to be seen by every one who seeks the truth; but, for those who are never satisfied without something from the books, let me read this brief, but clear and comprehensive, comment, by a great lawyer, upon the subject, in so far as it affects husband and wife, from the moral standpoint: "These qualified divorces are regarded as rather hazardous to the morals of the parties. In the language of the English Courts, it is throwing them back upon society in the undefined and dangerous characters of a wife without a husband, and a husband without a wife."

The welfare of the parties is a matter of the greatest importance, an ingredient never to be overlooked.

There is no allegation of any assault by the husband upon the wife; it is not suggested that he has laid hand upon her in violence or anger. There is no allegation of intemperance, or vice of any kind, in him; on the contrary, his moral character seems to be unimpeachable, at all events it has not been impeached in any way, though no stone seems to have been left unturned to discover and disclose everything that might be used against him in this action. He is not improvident, but the contrary, and well able to support wife and child, and to bring up, and suitably educate, the latter. So far as the evidence shews, he is an exemplary man in these respects, matters which go a long way in his favour in resisting this action, making this case a very different one from most of those in which a divorce is sought. Take, for instance, the case much relied upon for the plaintiff—*Mytton v. Mytton* (1886), 11 P.D. 141, 144. There it was proved that the husband had assaulted the wife, with their child in her arms, and his own statement in the witness box was that he had been "drunk and disorderly." Also the case, perhaps more relied upon, of *Bethune v. Bethune*, [1891] P. 205, in which, beside being guilty of "legal cruelty," the husband kept a mistress upon whom he seems to have devoted his affection, whilst he gave scant civility to his fond wife, telling her that she must lead her own life, that he could never be different.

Judged by the test that the defendant's misconduct must be such as to make it "an absolute impossibility that the duties of married life can be discharged;"—though that must now be taken to be an insufficient test in this respect, that there may be such

C. A.

1906

LOVELL

v.

LOVELL.

Meredith, J.A.



C. A.

1906

LOVELL

v. I

LOVELL.

Meredith, J.A.

case without a right to the relief here sought, but judged by that important and necessary test—the plaintiff's case wholly fails. The claim which she is pressing, with such persistent energy, is very plainly opposed to all interests; and that has on all hands been made plain to her by those whose advice she has sought, and upon whose advice she well might, and ought to, have relied and acted. Her first appeal was to her spiritual adviser, the rector of the church of which she was a member, who seems to have used his knowledge with much care and discretion, and, acting upon her own statements only, advised her to return to, and live with, her husband, and did what lay in his power to prevent anything like a permanent separation; but his advice, not being that which the plaintiff desired, was rejected, and this action brought. Then during the trial of this action, and after the whole of the plaintiff's and part only of the defendant's case had been heard, the learned Chancellor, with something like paternal solicitude, took the same ground, and in these words urged a reconciliation: "I do not see why the wife should not go back. I think the friction occurred when they were not both themselves. The man was run down and she was run down. Perhaps they said things that might be better left unsaid, and perhaps drifted on that way when they were in this highly nervous condition, each consulting lawyers and so on. But matters have gone on, and the woman having become restored to much better physical, and I have no doubt, mental condition, and hearing this offer of her husband, not only in open Court, in the presence of spectators, but under the sanction of an oath, if she believes there is any good in him, now is the time to accept his offer and go back, and let the child be a bond of union between them. That would be my advice, not as a Judge, but as one who has heard so much of the case in the trial of it. I should earnestly entreat the parties on both sides to consider this proposition, and re-unite themselves solemnly again, and not live apart in future." But this, too, was rejected with dogged persistency, by the wife.

It is manifest that neither the reverend rector, nor the learned Chancellor, deemed that a return by the wife to her husband would be at all likely to jeopardize her life or health, or would be against her best interests, but quite the contrary; and the evidence, in my opinion, leaves no room for doubt that they were entirely right;

and, such being the case, the action fails. The words of the learned Chancellor, which I have read, deal with the facts of the case in an eminently satisfactory and comprehensive manner. Doubtless it may be possible to usefully add to them, but doubtless nothing has been yet so added to them, or is likely to be, though the facts have twice since been threshed threadbare in two Courts of Appeal, and I would deem it necessary only to subscribe to them, but for the fact that the learned Judge afterwards gave judgment which is, in my opinion, quite inconsistent with them, and which must, I think, have been rendered in forgetfulness of the question of paramount importance—what was in the best interests of the persons concerned, and whether there was any absolute impossibility of the duties of married life being performed.

But she persists, and the judgment has gone in her favour; it is therefore proper for me to refer, but only as briefly as possible, to the facts of the case as proved at the trial.

The plaintiff has no good ground of action unless her husband has been guilty of what the law considers "cruelty" towards her. And, according to the source from which all inspiration upon the question of cruelty is almost invariably derived, "the causes must be grave and weighty and such as to shew an absolute impossibility that the duties of the married life can be discharged;" and, "in the older cases of this sort which I have had an opportunity of looking into I have observed that the danger of life, limb or health is usually inserted as the ground upon which the Court has proceeded to a separation; this doctrine has been repeatedly applied by the Court in the cases that have been cited; the Court has never been driven off this ground, and I have heard no one case cited in which the Court has granted a divorce without proof given of reasonable apprehension of bodily hurt." Attempts to drive the Court off that ground have been made, the last in the *Russell* case, which has authoritatively and firmly settled the law that the question, what is cruelty, is not answered by an answer to the question, has the conduct complained of been such as to make continued cohabitation impossible, but is answered by an answer to the question, has the conduct complained of been such as to cause danger, or reasonable apprehension of danger, to life, limb or health; and which therefore includes impossibility of cohabitation. Can it reasonably be said that there was any real danger to life or health

C. A.

1906

LOVELL

v.

LOVELL.

Meredith, J.A.

C. A.  
1906  
LOVELL  
v.  
LOVELL.  
Meredith, J.A.

in this case? The ill-health meant is not that which a nervous temperament can acquire at the shortest notice, but must be something of a permanent or serious nature. In the case of *Kelly v. Kelly*, L.R. 2 P. & M. 59, another case relied upon for the plaintiff, the finding of the Court was, "that, from the treatment she suffered after her return from Ireland, her health was so broken down that to continue subject to the same treatment for any length of time would not only seriously have imperilled her health, but would have exposed her to the highly probable consequence mentioned by the medical men, viz., paralysis or madness." And in the case of *Mackenzie v. Mackenzie*, [1895] A.C. 384—still another case relied on by the plaintiff—the husband had assaulted his wife, causing her actual bodily injury to some extent, among many other cruel things done in an exceedingly domineering manner; so that the Lord Chancellor said that he was satisfied she could not have returned to her husband without the apprehension that the unjustifiable violence he had used might be repeated, and that he thought the anticipation of further violence well founded and not an unreasonable or fanciful idea; and Lord Watson added that the effect of her treatment was to create in her mind a nervous apprehension that she would be deprived of her personal liberty, and that there could be little reason to doubt that she had good cause for entertaining these apprehensions. And it was also found that the plaintiff had not an honest desire to resume cohabitation, and his offers to receive his wife again were properly regarded by her with suspicion "as not made with any *bonâ fide* desire to win her back, but rather as steps to a process of divorce which would strip her of name, home and fortune." A good deal of light is thrown upon this case by the facts that it was an action by the husband for a divorce from his wife, on the ground only that she had not lived with him for four years, the effect of which, if the husband succeeded, would be to strip the wife of her name and hand over her fortune to him—regarding her as dead. He did not succeed. And in the case of *Walmesley v. Walmesley* (1893), 62 L.T.N.S. 152, the wife's health certainly gave away; and it was proved that a continuance of the ill-treatment would probably have caused insanity, in the form of melancholia.

Then it must always be borne in mind that the evidence of husband and wife in such a case as this is very apt to be greatly exaggerated, and ought to be correspondingly discounted: see, *per Halsbury, L.C.*, in *Russell v. Russell*, [1897] A.C. 395, at p. 422. Reasonably dealt with, is there any sort of evidence of cruelty? Husband and wife are both persons of neurotic temperament, and, as might be expected, in the habit of "nagging" one another to a very unnecessary and distressful extent, but to assert that the life of either was thereby jeopardized would be absurd; that the health of each was, to some extent, at times affected by worrying over their inexcusable, but really trifling, squabbles can be well believed. It is not so uncommon an experience as to cause any doubt on that score. But all that either required was a change, a holiday, a short separation. That I take to be the effect of the whole evidence properly discounted, and it is quite in accord with what common experience teaches. There is nothing to indicate ill-health of any but a temporary character. If there had been, the woman's state of health at the trial would have refuted it. She there appears to have been stronger, and much more energetic, than litigants of that class usually are—she proved to be in fine fighting condition. If such ill-health as was proved in this case were a good ground for divorce, there would be few cases, if any, in which a wife, desiring separation, could not readily make a case ample for her purpose. The impairment of health must be something of a more grave character, not one which the rest cure of a month, or a less separation of a pleasanter character, would quite repair.

Magnified to the fullest extent, the husband's misconduct, weak and inexcusable though it may have been, and not sought to be wholly justified by him, or in his behalf, gives no sort of hopeless outlook for the future safety and peace of the household, if the wife return and really endeavour, as her duty is, to avoid childish disputes. That their differences have been exaggerated is very apparent; it can hardly be otherwise in such a case as this. We are seriously told that the husband said to the wife, "darn you;" considering all the "nagging" on both sides, it is perhaps extraordinary only in this, that he got no further. So far as vain words are concerned he has surely proved himself an unusually mild man. Again, he is accused of having charged his wife with unchastity,

C. A.

1906

LOVELL

v.

LOVELL.

Meredith, J. A.



C. A.

1906

LOVELL

v.

LOVELL.

Meredith, J.A.

because, on one occasion of wrangling, he used the word "unfaithful" in connection with her. But no one can fairly—and no one but the wife's sister has endeavoured to—give that word, used as it was, any such meaning; nothing ever said by him, on any other occasion, gives any sort of warrant for such an interpretation of the word. The accompanying words are against it, and he indignantly denies it. His wife, who was present, gave it no such meaning. Her own sister, in her eagerness to aid her in this action, alone puts the disreputable cap upon her head. Again, there is the story of the denial of necessary underclothing in winter. A story half told is notoriously apt to be very misleading. The whole story, which there does not appear to be any very great reason for disbelieving, is that the man asked his wife to wait until the holiday sales, to which she, tacitly at least, agreed, having the use of some of his clothing in the meantime. And again, the story of the cruelty of not permitting her to take the child with her, when it was arranged for her to go south for a change of air and scene. There is nothing to shew that it would not have been better for her health's sake to go alone; with neurotic subjects it is well known that complete separation, for a while, from all family associations, and cares, is very desirable. The child was old enough then to be none the worse for remaining at home; more likely the better for the short separation from one worn out to some extent by worrying; and there were the dangers incident to long journeys in winter, and of strange quarters. The case is very different from that of *Mackenzie v. Mackenzie*, in which the child was a sucking babe, not many weeks old, and mother and child were going to stay with relatives. And so one might go through all the other incidents, some of them hardly worthy the name of a teapot tempest even, which have been so fully set out more than once already. It would be but waste of time to repeat them, so often told that one might forget that there are two sides to this story, as well as to most stories, and that it is but fair play to advert shortly to some of those on the other side, and which are of no mean weight, if weighed in the same scale as the plaintiff would have used to weigh the defendant's misconduct.

For one thing, there is the extraordinary fact of the wife keeping for at least more than a year a record of her husband's misdeeds

and faults, which largely formed the basis of this action, and her evidence, and the conduct of her case, and upon which her statement of claim is based. She denied that it was kept for the purpose of seeking a divorce; but found it difficult to otherwise account for its existence; it would hardly have been kept for the mere pleasure of the thing, and it is to be hoped that it was not for literary purposes, and that the public might some day be told of "The Horror of Having a Husband." Those who have made excuses for it, which she has not, seem to me to accuse quite as much as excuse, for, if kept with a view to separation of parent and child, it would be kept with a view to separation of husband and wife: her first statement, under oath, of its purpose, is in these words:—

C. A.

1906

LOVELL

v.

LOVELL.

Meredith, J.A.

"314. Q.—You have stored all these things well in your mind?  
A.—I have thought of them at different times, and I have written them out.

315. Q.—Just as they occurred? A.—Yes, just as nearly as I could remember.

316. Q.—At the times they occurred you wrote them out?  
A.—Not always.

317. Q.—Nearly always? A.—No, I will tell you how that occurred.

318. Soon after the occurrence you would write it out?  
A.—Not always.

319. Q.—But sometimes? A.—Sometimes, and for this reason—

320. Q.—Thinking that you might require to use it in a suit afterwards? A.—No, it was for this reason—when I would tell Mr. Lovell—complain to him about his speaking to me in this way, and tell him these things, he would deny it and say it was lies, and that he had never told it, so that I made up my mind to write it down, so that I would make no mistake.

321. Q.—Because you thought you might have to use it afterwards? A.—No, so that I might show him that he did say them." Can there be any reasonable doubt that the purpose in keeping the black-book was a separation—a divorce? Then there is her extraordinary conduct during his illness—when suffering from that most depressing disease influenza, and so ill that he was unable to stand up—nagging him beyond his endurance in his enfeebled

C. A.

1906

LOVELL

v.

LOVELL.

Meredith, J. A.

state, and then complaining of his ineffectual efforts to strike at her. Her own account of this occurrence discloses an extraordinary blindness to her duties "in sickness and in health," an oblivion to that charity which would move even a stranger towards an enfeebled bed-ridden patient. It is not extraordinary that, with his physician's approval, he was removed from his bed to another house, even at the risk necessarily involved in a removal at that season of the year—in winter. And again, in this action, the wife made that which must now be taken to have been a wholly foundationless charge of adultery against her husband, for when challenged to proceed with it, no answer was given to the challenge, and eventually it was, by the trial Judge, directed to be "expunged from the record." And so one might go, *ad nauseam*, through all that has been said respecting all these somewhat petty family squabbles, most of which seem to me hardly fair subjects for ventilation in courts of law, much less such as should support a divorce; but which, perhaps, it is impossible for two such neurotic persons to be always entirely free, unless indeed they could be entirely prevented from talking about them. If the mainsprings of them are to be sought, it would not be difficult to find one of them, at least, in the wife's inordinate selfishness, in her apparent expectation that the adoration of ante-nuptial days is to last through life, that all her husband's actions and thoughts are to be centered in her, and that she is as incapable of anything that is not to be admired and praised, as all she did and said then was. An instance is afforded in her jealous and persistent desire and effort to prevent that intercourse and affection which ought to exist, and which she ought to encourage, between her husband and his aged father and mother, met by foolish reprisals, on his part, until the childish agreement was made between them, that their child should not go to any of his grandparents, though apparently they are quite as worthy people, in all respects, as any of their children. They should both look forward to the possible time when their own children may place a like ban upon them, in order to fully appreciate the effect of their conduct. It may be that newspaper witticisms on the subject of mothers-in-law have much to do with this; if so, it is to be regretted that any woman should have no better means of education.

And if one is bound to take the position of an umpire in regard

to all their family squabbles, I would be obliged to say that honours, or dishonours, are about even. But, of course, it may be, that the umpirage of anyone who has neither married nor marriageable daughters, and so may be thought to lack the experience which teaches, may not be accepted with the greatest confidence on all hands.

Why should this Court give anything like permanency, or, indeed, any sort of encouragement, to the separation of these comparatively young respectable persons, of good moral character, but a few years married, and already more knit together by the birth and life of their child; and who have everything requisite to the making of a reputable, and indeed exemplary, family, now that the husband must see the folly of his faults, and the wife the futility, as well as the mistake and danger, of her strong desire for a separation, if she receive no encouragement from this Court in it; a separation which experience teaches will probably soon be regretted, and then followed by an equally strong desire to live together again; for the lot of an honest woman, who is a wife without a husband, is not likely to be a happy one? Why should these two be parted against the advice of the wife's best and wisest advisers?

"I do not see why the wife should not go back. I think the friction occurred when they were both not themselves. The man was run down and she was run down. But matters have gone on and the woman has become restored to much better physical, and I have no doubt mental condition." Can any one dispute the accuracy of these words? So long as they stand, a judgment in the plaintiff's favour cannot rightly stand. The Court ought not to be driven from its position, however much masculine inclinations may naturally lead one to aid feminine distress of any kind. The better inclination would be, not to lead or encourage into the difficulties and dangers, and the opprobriousness, which they, and their child, must encounter if they are divorced from bed and board.

No case of cruelty is proved. It is manifest that it is not a case in which "the facts shew an absolute impossibility that the duties of the married life can be discharged." On the contrary, it cannot be doubted that if the wife would expend, in the promotion of harmony and happiness in the household, one tithe of the energy and skill she has employed in the prosecution of the action,

C. A.

1906

LOVELL

v.

LOVELL.

Meredith, J.A.



C. A.

1906

LOVELL

v.

LOVELL.

Meredith, J. A.

she would be far more successful than she ought to be upon this appeal; the husband of course doing his part, as he has undertaken under oath to do. All interests, the husband's, the wife's, the child's and the state's, concur in union, and I can find no excuse for separation.

I would allow the appeal and dismiss the action, upon the defendant renewing his undertaking given at the trial; and would give the plaintiff her costs of the action down to the time of the just and wise utterance of the trial Judge, but her disbursements only since that time.

G. F. H.

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## [IN THE COURT OF APPEAL.]

LOVELL V. LOVELL.

C. A.

1907

Jan. 28.

*Supreme Court of Canada—Leave to Appeal—Special Grounds—  
Dissenting Judgments.*

Leave to appeal to the Supreme Court of Canada from the judgment of the Court of Appeal, *ante* 569, was refused, the majority of the Court holding that it was not necessary to consider, upon an application for leave, the question whether an appeal would lie without leave, and being of opinion that no special reasons were shewn for granting leave, the circumstance that out of the nine Judges of the Provincial Courts who heard the case two dissented from the opinion of the majority, not being a special ground. MEREDITH, J.A., dissenting, was of opinion that an appeal lay without leave, and therefore the Court of Appeal had no jurisdiction to entertain the application for leave; but that, if there were jurisdiction, the leave should be granted.

MOTION by the defendant for leave to appeal to the Supreme Court of Canada from the judgment of the Court of Appeal, *ante* 569, dismissing (Meredith, J.A., dissenting) an appeal by the defendant from the order of a Divisional Court, 11 O.L.R. 547, dismissing (Street, J., dissenting) an appeal by the defendant from the judgment of Boyd, C., *ib.*, in favour of the plaintiff in an action for alimony. The amount of permanent alimony was not fixed, the original judgment having directed a reference to the Master to fix it, and the reference having been stayed by the appeals. The amount in controversy, therefore, not being ascertained as more than \$1,000, as required by 60 & 61 Vict. ch. 34, sec. 1 (D.),\* the defendant, deeming that leave to appeal was or might be necessary, made this application.

\* No appeal shall lie to the Supreme Court from any judgment of the Court of Appeal for Ontario, unless,—

- (a.) the title to real estate or some interest therein is in question;
- (b.) the validity of a patent is affected;
- (c.) the matter in controversy in the appeal exceeds the sum or value of one thousand dollars exclusive of costs;
- (d.) the matter in question relates to the taking of an annual or other rent, customary or other duty or fee, or a like demand of a general or public nature affecting future rights; or
- (e.) special leave of the Court of Appeal for Ontario or of the Supreme Court of Canada to appeal to such last-mentioned Court is granted.

2. Whenever the right to appeal is dependent upon the amount in dispute such amount shall be understood to be that demanded and not that recovered, if they are different.

C. A.  
1907  
LOVELL  
v  
LOVELL.

The motion was heard by MOSS, C.J.O., OSLER, GARROW, MAC-LAREN, and MEREDITH, JJ.A., on the 26th November, 1906.

G. H. Watson, K.C., for the defendant, contended that substantially a large amount was involved, upon a fair basis of calculation; that both the plaintiff and defendant were young and might live a long time; that the matters in question were of special importance to the parties and their child; that the question of law involved in the definition of legal cruelty was an important one; and the difference of opinion in the Courts made a further appeal desirable. He referred to *Lapointe v. Montreal Police Benevolent and Pension Society* (1904), 35 S.C.R. 5; and cases cited in Cameron's Supreme Court Practice, p. 216 *et seq.*

J. King, K.C., for the plaintiff. The plaintiff has no means of support except \$60 a month from her husband under a temporary arrangement for support of herself and child. Nothing but a question of fact is involved.

January 28. Moss, C.J.O.:—The defendant has made an application for leave to appeal to the Supreme Court under the Act 60 & 61 Vict. ch. 34, sec. 1 (e) (D.) The motion presupposes that there is no right of appeal under any of the preceding sub-sections, and we have to deal with it on that assumption.

We are not called upon on this application to consider the question of the right to appeal without leave, the determination of which must, in the last resort, rest with the Supreme Court. If the defendant has the right to appeal without leave, our granting or refusing this application cannot help or injure him.

But, if special leave is necessary, then some special grounds must be shewn to take the case out of the statute, which provides that no appeal shall lie to the Supreme Court from any judgment of the Court of Appeal for Ontario unless in the specified cases.

The defendant's case has been submitted to the consideration of nine Judges. The action was tried by the learned Chancellor, who found against the defendant. The defendant appealed to a Divisional Court, which affirmed the judgment at the trial, the late Mr. Justice Street dissenting. He then appealed to this Court, and the Chancellor's judgment was again affirmed, Mr. Justice Meredith dissenting. There was no difference of opinion as to the law among the Judges who have taken part in the case. The case

really turned upon the facts, and nothing more than a question of fact is involved.

The circumstance that two Judges dissented from the opinion of the majority, and even the further circumstance that they were in favour of granting leave to appeal, has not been considered a special ground for granting the leave: *Toronto R.W. Co. v. Robinson* (1901), cited in Cameron's Supreme Court Practice, p. 222 ; and see *Attorney-General v. Scully* (1902), 33 S.C.R. 16.

It is urged that the case is an important one to the parties, and no doubt it is, as are many other cases in which no right to appeal is given. But it is also a case which it is important should be brought to an early conclusion. If the parties are ever to be reconciled, it will not be by the continuance of the litigation, with all its embittering consequences. And in the meantime the plaintiff, who is without means save her alimony allowance, will be subjected to bear as best she can the large expenses incidental to or connected with the conduct of her case. We have no power to bind the Supreme Court by any order as to costs in any event of an appeal, and the defendant would not even express his willingness to agree to bear all the costs incurred or to be incurred in any event of the appeal.

But, quite apart from these considerations, there have been no special reasons shewn for granting the leave applied for.

The motion should be dismissed with costs.

OSLER, GARROW, and MACLAREN, JJ.A., concurred.

MEREDITH, J.A.:—This application is for leave to appeal to the Supreme Court of Canada; and the first question for consideration must necessarily be: Has this Court any lawful power to grant or refuse such leave? If not, however much it may lessen one's labour to avoid the question, it cannot be right to assume jurisdiction merely because it is not to be exercised in giving, but it is to be exercised in refusing, leave. If there be no jurisdiction, the motion should be dismissed on that ground, not upon the merits of an application which there is no power to entertain.

Then is there any jurisdiction to deal with this application on its merits? The power of the Court, of course, rests entirely upon statute, and ought to be clearly found, especially when we are asked

C. A.  
1907

LOVELL  
v.  
LOVELL.

MOSS, C.J.O.



C. A.  
1907

LOVELL  
v.  
LOVELL.

Meredith, J.A.

to do something not affecting this Court but affecting the higher Court. Legislation provides for two classes of cases which may be appealed to the Supreme Court of Canada; first, those in which Parliament has given leave to appeal; and, second, all other cases, as to which power is given to this Court, and to the higher Court, to grant leave. It is, therefore, manifest that if this case be one in which Parliament has granted leave to appeal, this Court has no power to refuse or to grant it, but is limited in power to dismissing the application on the ground of want of jurisdiction.

In my opinion, there is no jurisdiction in this case, because it is one of those cases in which Parliament has exercised the power, in granting leave.

Among other cases in which it has granted such leave, it has granted it where the matter in controversy in the appeal exceeds the sum or value of \$1,000. That which is directly in controversy here, in a pecuniary sense, is the plaintiff's right to the alimony, which has been awarded to her, and which runs from the date of the judgment awarding it; and no one can suggest that that does not exceed "the sum or value of \$1,000." In theory the amount of the alimony is fixed by the Court at the trial, and in practice that is commonly done; it can surely make no difference that, for the convenience of the trial Judge, or of the parties or witnesses, it is referred to an officer of the Court to ascertain and state what is the proper sum. Interim alimony has been fixed by the Court, or agreed upon between the parties, and paid, at \$60 a month: interim alimony is, as a rule, less than permanent alimony; but, put on the basis of the interim alimony, the judgment gives the plaintiff \$720 a year for life; and, under a Provincial enactment, that annual sum is made a charge upon all the defendant's lands after registration—which has been effected in this case—"with the same effect as the registration of a charge by the defendant of a life annuity on his lands." The plaintiff's age appears to have been about thirty at the date of the judgment, so that, according to the Carlisle tables, the present value of the judgment, at 5 per centum, is about \$12,000.

It seems, therefore, manifest to me, that this is a case in which Parliament has given a right to appeal; and so there is no jurisdiction in this Court; and that, accordingly, the motion should be refused, without considering the merits of the application.

But, as a majority of the Court have come to a different con-

clusion, to some extent, and seen proper to deal with the application on the merits, the parties are entitled to my opinion in that respect.

In cases of the second class, namely, those with which Parliament has not dealt, but has left to be dealt with by the Courts in each particular instance, what principle should be acted upon in granting or refusing leave? It is manifest that some principle should guide; that the power should not be exercised according to favour or disfavour, inclination or disinclination, but that all should stand upon an equal footing just as they do under the parliamentary leave.

It seems to me equally manifest what that guide should be—that which should be the principle applicable to all cases of granting leave to appeal to the Supreme Court of Canada. Surely it should be the same principle which Parliament has adopted in giving leave to so appeal. It was impossible to set out specifically, in an Act of Parliament, all the cases, and to expressly deal with them there; their name and diversity is legion; all that could be done was to deal with the more numerous, and leave it to some other body to deal with the rest. So the general rule should be to grant leave in all cases which are analogous to those in which the right to appeal is expressly given. The standard which Parliament has adopted should be the standard under which the Court should act. The object of the enactment was to grant leave to appeal in cases which Parliament considered of sufficient moment or importance to the parties to warrant an appeal, if either desired to do so and took the necessary steps to reach the higher Court. And it follows that in cases coming within one of the classes dealt with by Parliament, but not sufficient in amount, special circumstances must be shewn; they are below the standard: and are obviously different from such a case as this.

It would assuredly be a gross anomaly, discreditable to the administration of justice, if an appeal should lie, under the expressed words of the enactment, in respect of the title to a piece of land of trifling value and yet be refused in cases of vast importance: see *City of Toronto v. Toronto Electric Light Co.* (1906), 11 O.L.R. 310; if it should lie in respect of the simplest case involving the sum of \$1,000, and be refused in a case which all parties deem, and reasonably deem, of inestimable value.

C. A.

1907

LOVELL

v.

LOVELL.

Meredith, J.A.

C. A.  
1907  
LOVELL  
v.  
LOVELL.  
Meredith, J.A.

Dealt with according to this rule, leave should be granted; no serious objection could be made to the application. That which is in controversy is of paramount importance; such things as the title to a few feet of land, or one thousand dollars in money, are things in no manner comparable in importance or value. Indeed, is there anything, in any of the cases in which the Act expressly gives leave to appeal, of greater or equal importance? And would it not be open to either party, if refused leave, to say, with great force:—Your laws are uneven? And would it be very unfair to endeavour to thwart their effect, rather than to obey them, when so administered? A debtor to the applicant for \$1,000 on a promissory note, to which there is no reasonable defence, can carry an action against him, to recover it, to the Supreme Court of Canada, but this applicant cannot get leave to take this case, of utmost importance to him, his wife, and child, to the same tribunal!

Of the importance of the case to the applicant, there can be no manner of doubt; the judgment he desires to appeal against deprives him of his home, his wife, and child, and puts him under a liability chargeable, and now charged, upon all his lands, to the extent of about \$12,000.

I have already, in the opinion expressed upon the merits of the appeal, pointed out the importance of the case from the public point of view; and shall not repeat, further than to say, that it cannot be in the public interests that divorces of any character should be made easy, or that they should be removed from the oversight and correction of the highest Court; that Court being expressly the appropriate one in cases of divorce, being, not only the highest Court, but a federal Court, surrounded by the federal atmosphere, the subjects of marriage and divorce being within the exclusive jurisdiction of federal legislation; whilst this Court is but a provincial Court, and the various provincial atmospheres may not be, upon such questions, all of the same character as the federal. And it will be found that cases such as this not infrequently go to the highest Courts in the Empire: see, for one instance, *Mackenzie v. Mackenzie*, [1895] A.C. 384, and for another see *Smart v. Smart*, [1892] A.C. 425, in which the custody of children only was involved.

I have also pointed out in the same opinion that the matters in controversy are of a great importance: (1) to the State; (2)



to the communities in which the husband without a wife, and wife without a husband, may reside; (3) to the moral and material welfare of the husband; (4) to the moral and material welfare of the wife; and (5) to the moral and material welfare of the child; and shall not repeat what is there said or the citations made.

It is said that the questions involved are but questions of fact. If that were so, is that a sufficient reason for refusing leave to appeal? Is the parliamentary leave given only in regard to questions of law? There is no good reason why questions of fact should not be as carefully considered as questions of law in appeal, though of course a judgment will not be readily disturbed on a conflict of testimony as to facts, but that is a question for the higher Court after hearing the appeal. The cases in the House of Lords and in the Privy Council shew how carefully, and minutely, cases like this have been considered there, upon their facts quite apart from any question of law.

However, I am quite unable to agree in the view that no question of law is involved. On the contrary, it seems to me that there are two questions of that character, of the utmost importance, involved: first, the point so much relied upon by Mr. Watson, throughout the argument of the appeal, that there can be no divorce without personal violence, inflicted upon the party seeking it by the other party; and there are unquestionably observations reported in the case of *Russell v. Russell*, [1897] A.C. 395, upon which an argument anyway, for such a conclusion, might be based; and, second, there is the question of the utmost importance, and upon which there is yet very little judicial light:—to what extent, in the absence of physical violence, must health be affected before a divorce can be granted: must it be of a permanent character, or will it do if it be of a mere temporary nature? I regret very much that no one has tackled the question in this case; but yet hope that, if it go further, we may all fare better in this respect from light thrown upon it by the higher Court. It seems plain that no Judge, who has considered the plaintiff entitled to a divorce, could have thought her ill-health of an alarmingly serious character, for not one of them has failed either to suggest a reconciliation, or to find fault with the solicitors for not having made greater effort to bring it about, or to even pathetically urge it; which could not be if there were any grave danger to health; but to recommend and to entreat one of neurotic temperament is generally but to encounter resistance; for the

C. A.  
1907

LOVELL  
v.  
LOVELL.

Meredith, J.A.



C. A.  
1907

LOVELL  
v.  
LOVELL.

Meredith, J.A.

hysterical it is well known that an involuntary cold bath is often far more efficacious.

Again, I am quite unable to agree in the view that a dissenting judgment has no effect upon the question whether leave should be granted or not. Apart from authority upon the subject, I would have thought that want of unanimity in any Court—the dissent of any Judge—should have considerable weight; and that the well considered judgment of that careful and able Judge—the late Mr. Justice Street—would give pause to any Court of this Province, before refusing leave to appeal. I am quite unable to find any authority whatever for any opinion that a dissenting judgment is immaterial upon this question, and no one has referred to any such authority. I am well aware—every one must be—of the highest authority to the contrary, the authority of Parliament, and of the Legislature of this Province: as to the latter under 4 Edw. VII. ch. 11, sec. 2, (76 (1) (a)), an appeal is given to this Court from a Divisional Court in every case in which there is a dissent; and, unless the sum or value of the subject matter in controversy here amounts to \$1,000, there would have been no jurisdiction in this Court to entertain the appeal in this case but for Mr. Justice Street's dissent: then Parliament has allowed an appeal from this Court in all criminal cases in which there is a dissent, and in none other. And we are all familiar with cases in which even a large and strong Court for Crown Cases Reserved, has recommended a pardon, because one of them alone considered the conviction unwarranted.

And lastly, leave to appeal can be given without any sort of injustice, unfairness, or prejudicial delay to the plaintiff. Terms can be imposed so that proceedings upon her judgment shall be in no manner delayed or hampered, and the applicant can be required to pay her costs of the appeal in advance; so that, if the judgment be right, no one can be harmed, in any manner; whilst, if it be wrong, an irreparable injustice is done to the applicant in a most momentous matter. And we can surely trust the higher Court to do justice between the parties on the question of costs as well as on the merits of the case.

If we had jurisdiction, I would give leave to appeal almost as a matter of course.

Motion dismissed with costs; MEREDITH, J.A., dissenting.

E. B. B.

[IN CHAMBERS.]

FALLIS V. WILSON.

1907

Mar. 11.

*Attachment of Debts—Police Constable's Pay—Service on Treasurer—Payment to Agent—Payment in Advance.*

On a motion to make absolute an order attaching all debts due by a municipal corporation to the defendant, a police constable, which was issued on the 27th of February, and served on the treasurer of the corporation on the afternoon of the same day, it appeared the defendant's salary was \$900 a year, payable monthly at the end of each month:—

*Held*, that although the defendant was not a servant of the corporation the treasurer was the proper person to serve.

*Held* also, that the cheque for the defendant's salary for the month of February, which according to custom, had been delivered to a messenger to leave at the police station for the defendant, but on service of the order, had been stopped by telephone and brought back to the treasurer, had not come into the hands of the defendant's agent before service of the order; but

*Held* also, that there was no debt due as the month's salary was not payable until the end of the month, and that there is no law which forbids an employer to pay his servants' wages in advance.

THIS was a motion to make absolute an attaching order.

The following facts are taken from the judgment:—

On the 27th of February an order was made attaching all debts due or accruing due from the city of Toronto to the defendant, who is a member of the police force.

The order was made on an affidavit of the plaintiff's solicitor, that the defendant on his examination as a judgment debtor admitted "that his salary was \$900 a year, payable monthly in equal instalments, which fall due at the end of each month." This is admitted to be the fact.

The order was served on the city treasurer at 3 p.m. of the 27th. No material was filed on behalf of the defendant.

The motion was made in Chambers on the 6th of March, 1907, before Mr. Cartwright, the Master in Chambers.

*B. N. Davis*, for the judgment creditor.

*T. N. Phelan*, for the judgment debtor.

*A. A. Fraser*, for the garnishee.

MARCH 11. THE MASTER IN CHAMBERS:—Three objections were made by counsel for defendant.

Master in  
Chambers.

1907

FALLIS  
v.  
WILSON.

(1) It was contended that a policeman is not a servant or officer of the city, and so the attaching order was not properly served on the treasurer.

The first branch of this proposition is distinctly affirmed by 3 Edw. VII. ch. 19, secs. 488-491 (O.), and the judgment of the Chancellor in *Kelly v. Barton* (1895), 26 O.R. 608, at p. 623 (affirmed in Court of Appeal on 28th November, 1895, not reported). But sec. 492 provides that the city council shall appropriate and pay such remuneration for and to the respective members of the force, as may be required by the police commissioners. It seems, therefore, that the treasurer was the proper person to serve; for, as said by Lord Coleridge, C.J., in *Booth v. Trail* (1883), 12 Q.B.D. 8, at p. 10, in a similar case: "When there is a statutory obligation to pay money, and no other remedy is expressly given, there would be a remedy by action. It is clear that, there being a statutory obligation, and the corporation having the funds to meet it, the corporation could in some way or other be compelled to pay." I therefore think this objection fails.

(2) It was next contended, that the cheque had come into the hands of the defendant's agent before service of the order. It was admitted on argument, that the cheques for February had been given by the treasurer to his messenger to be left at the various police stations, according to the custom which is set out in a manuscript judgment of the late Judge McDougall, which I have had the advantage of perusing. It appears, that on being served with the order the treasurer telephoned to the messenger not to deliver the defendant's cheque, and it was accordingly brought back and is now in his hands. In the absence of any affirmative evidence to the contrary, it seems clear that the cheque was still in the control of the treasurer, as he was able to effect a stoppage in transit. I therefore think this objection fails.

(3) The last objection is that there was no debt due at the time of service of the attaching order.

The affidavit of plaintiff's solicitor has been already referred to, and there is no other evidence of the terms of the defendant's employment. Then, under *Hall v. Pritchett* (1877), 3 Q.B.D. 215, there was nothing *debitum in presenti*, as the month's salary was not due until the month had ended, and so there was not "a debt, the payment of which can be effectually enforced:" *per* Bacon, V-C.,

in *Chatterton v. Watney* (1881), 16 Ch.D. 378, at p. 383. To the same effect is the judgment of the late Sir Adam Wilson in *Shanly v. Moore* (1863), 3 P.R. 223. There must be something due at the time. If it is payable later, then Rule 911 would apply, and an order would bind the defendant.

There is no law which forbids an employer to pay his servants' wages in advance; and the case of *Wilson v. Fleming* (1901), 1 O.L.R. 599, seems to shew that salaries of the city officials can never be successfully attached unless they are held over for at least one day, and no cheques are delivered until then. If any one, to save himself annoyance, deliberately pays in advance, the creditor is helpless. If this could not be done the master would be obliged to dismiss the servant, who would starve unless he left the country.

Under the circumstances, the order will be discharged without costs. There will be a stay for two days to allow the plaintiff to appeal if so advised.

G. A. B.

Master in  
Chambers.

1907

FALLIS  
v.

WILSON.



## [DIVISIONAL COURT.]

D. C.

1907

Jan. 25.

BAXTER V. GORDON IRONSIDES &amp; FARES CO., LTD.

*Malicious Prosecution—Criminal Charge—Settlement Out of Court—  
Termination of Proceedings.*

An action for malicious prosecution, founded upon criminal proceedings, cannot be maintained, where it appears that the termination of the prosecution was brought about by compromise or agreement of the parties. The plaintiff was arrested and charged before a police magistrate with concealing and disposing of his property with intent to defraud his creditors, contrary to section 368 of the Criminal Code. After the plaintiff had been taken into custody, as the result of a suggestion, he gave up to the defendant certain moneys found on his person and gave his notes for the balance of the claim, and the prosecution was withdrawn, the police magistrate indorsing on the information "settled out of court."—

*Held*, that the plaintiff could not maintain an action for malicious prosecution.

*Wilkinson v. Howel* (1830), Moo. & M. 495, at p. 496, followed.

English and American cases reviewed.

Judgment of Boyd, C., reversed.

THIS was an appeal from the judgment of Boyd, C., at the trial, in an action for malicious prosecution, tried at Port Arthur, on the 11th day of June, 1906, before him with a jury, directing a judgment for the plaintiff for the sum of \$500 upon the findings of the jury in his favour.

The following statement of facts is taken from the judgment of Anglin, J., in the Divisional Court.

The plaintiff was indebted to the defendants, the Gordon Ironsides & Fares Co., Ltd., of which company, the defendant Brown was the agent at Fort William.

Under circumstances which a jury have found did not afford reasonable and probable cause for belief in the plaintiff's guilt, the defendant Brown laid an information against him charging him with concealing and disposing of his property with intent to defraud his creditors under sec. 368 of the Criminal Code.

After the plaintiff had been taken into custody, apparently upon a suggestion of the District Crown Attorney, that the matter should be settled, an arrangement was made between the plaintiff and the defendant Brown, by which, upon the latter receiving the sum of \$300, part of the sum of \$336 found upon the person of the plaintiff when arrested, and three promissory notes of the plaintiff for the sum of \$255, the balance of the indebtedness of the plaintiff

to the defendant company, Brown consented to forego further prosecution of the plaintiff upon the criminal charge.

Under this agreement Brown and the plaintiff appeared before the magistrate, and upon Brown receiving the \$300 in money and the three promissory notes signed by the plaintiff, the magistrate indorsed upon the information the words "settled out of court," and appended his signature as police magistrate, and the plaintiff was allowed to go.

From the judgment of Boyd, C., at the trial, the defendants appealed to a Divisional Court, and the appeal was argued on the 17th of January, 1907, before MULOCK, C.J.Ex.D., TEETZEL and ANGLIN, JJ.

*H. L. Drayton*, for the appeal. The evidence shewed that the plaintiff was trying to get rid of his property and that the information laid was fully justified. But even if not, there was no termination of the proceeding in favour of the plaintiff. His guilt or innocence was not considered and pronounced upon by the police magistrate. An acquittal is necessary. It is not against the public policy to compromise a criminal charge, when there is a choice between a criminal and a civil remedy, and under the circumstances of this case, no action will lie. In any event, the company defendant is not liable for the tort of its servant the defendant Brown. I refer to *Watt v. Clark* (1889), 18 O.R. 602, *per* Rose, J., at p. 604; *M'Cormick v. Sisson* (1827), 7 Cowen (N.Y.S.C.) 715; *Gallagher v. Stoddard* (1888), 54 N.Y. 101 (47 Hun); *Emery v. Ginnan* (1887), 24 Ill. App. Ct. 65; *Rosenberg v. Hart* (1889), 33 Ill. App. Ct. 263; *Fisher v. The Apollinaris Co.* (1875), 44 L.J.N.S. 500; *Bank of New South Wales v. Owston* (1879), 4 App. Cas. 270; *Cullimore v. Savage South Africa Co.*, [1903] 2 Ir. R. 589, at p. 625; *Hanson v. Waller*, [1901] 1 K.B. 390; *Miller v. Manitoba Lumber and Fuel Co.* (1890), 10 C.L.T. Occ. N. 230; *Thompson v. Bank of Nova Scotia* (1903), 13 C.L.T. Occ. N. 311; *Thomas v. Canadian Pacific R.W. Co.* (1906), 8 O.W.R. 93.

*W. E. Middleton*, contra. The information laid was that Brown made away with his property with an intention to defraud, but the evidence shews that he did not make away with any of his property. The company is liable for Brown's acts, the test being,

D. C.  
1907

BAXTER  
v.  
GORDON  
IRONSIDES  
AND  
FARES  
Co.

D. C.  
 1907  
 BAXTER  
 v.  
 GORDON  
 IRONSIDES  
 AND  
 FARES  
 Co.

whether what he did was in the course of his business or outside of it, and Brown's duty was to superintend and manage the company's business and collect the accounts: *Barwick v. English Joint Stock Bank* (1867), L.R. 2 Ex. 259, at p. 265 *et seq.*; *The Sheppard Publishing Co., Ltd., v. The Press Publishing Co., Ltd.* (1905), 10 O.L.R. 243; *Citizens Life Ass. Co., Ltd., v. Brown*, [1904] A.C. 423; *Mackay v. The President, etc., of the Commercial Bank of New Brunswick* (1874), 5 P.C. 394. Brown was not found guilty by the police magistrate, but on the contrary was discharged, and that was a termination of the proceeding in his favour: Clerk & Lindsell's Law of Torts, 4th ed., 646; *Fisher v. Bristow* (1779), 1 Doug. 216; *Castrique v. Behrens* (1861), 3 El. & El. 709, at p. 721; Newell on Malicious Prosecution, pp. 330 and 359; *Brown v. Randall* (1869), 36 Conn. 56; *Cardinal v. Smith* (1872), 109 Mass. 158; *Gilchrist v. Gardner* (1891), 12 N.S. Wales L.R. 184; *Pierce v. Street* (1832), 3 B. & Ad. 397; Am. & Eng. Ency. of Law, 2nd ed., vol. 19, p. 685; Ency. of the Laws of England, 86. In *Watt v. Clark* (1889), 18 O.R. 602, the man was found guilty.

*Drayton*, in reply. In the *Sheppard* case and others relied on to make master liable for servant's act outside of the general scope of his duties, there was ratification; here there was none.

January 25. The judgment of the Court was delivered by ANGLIN, J. (after stating the facts as above):—Upon this state of facts the defendants contend, that the plaintiff cannot maintain an action for malicious prosecution, because unable to shew a termination of the criminal proceeding favourable to himself. The plaintiff relies upon the disposition made of the proceeding in the police court by the settlement and his consequent release from custody as sufficient proof of a termination in his favour to give him a status to maintain this action.

It is common ground that the criminal proceedings must be, and that they have been, in this case, terminated. It is conceded by the defendants, that the abandonment of a prosecution by the complainant or the entry of a *nolle prosequi* by the representative of the Crown—if not the result of some compromise or arrangement with the accused—is a termination of the criminal proceeding in favour of the accused: *Gilchrist v. Gardner*, 12 N.S. Wales L.R. 184; *Pierce v. Street*, 3 B. & Ad. 397. But upon the question, whether

entry of a *nolle prosequi* or an abandonment, brought about by compromise or settlement with the accused or by his procurement, is such a termination, the parties are at issue.

In *Morgan v. Hughes* (1788), 2 T.R. 225, Buller, J., said, at p. 231: "Saying that the plaintiff was 'discharged' is not sufficient; it is not equal to the word 'acquitted,' which has a definite meaning." In *Wilkinson v. Howel* (1830), Moo. & M. 495, at p. 496, Lord Tenterden said: "The rule involves this principle, that the termination must be such as to furnish *prima facie* evidence that the action was without foundation." A spontaneous abandonment or entry of *nolle prosequi* affords such *prima facie* evidence; an abandonment due to settlement or compromise certainly does not. In *Goddard v. Smith* (1795), 6 Mod. 262, Powell, J., said: "This action cannot be maintained but upon an acquittal of the fact charged, by verdict, confession, etc"; and Holt, C.J., said that "to maintain a conspiracy, it is necessary to prove an acquittal": p. 262. In *Castrique v. Behrens*, 3 El. & El. 709, at p. 721, Crompton, J., said: "In such an action it is essential to shew that the proceeding alleged to be instituted maliciously and without probable cause has terminated in favour of the plaintiff, if, from its nature, it be capable of such a termination." In *Abrath v. North Eastern R.W. Co.* (1883), 11 Q.B.D. 440, at p. 455, Bowen, L.J., said: "In an action for malicious prosecution the plaintiff has to prove, first, that he was innocent and that his innocence was pronounced by the tribunal before which the accusation was made." Rose, J., quoted this passage with apparent approval in *Watt v. Clark* (1889), 18 O.R. 602, at p. 604.

In *Redway v. McAndrew* (1873), L.R. 9 Q.B. 74, Blackburn, J., said: "No doubt, to maintain the action, the proceedings in the county court must have been determined in the plaintiff's favour": at p. 75.

In *Taylor v. Ford* (1873), 29 L.T. 392, where, instead of contesting the seizure of his ship, the plaintiff had procured its release by payment of the claim against her, under protest, whereupon further proceedings had been stayed, the Court held an action for instituting malicious process to be not maintainable because the plaintiff did not shew a termination in his favour of the alleged wrongful proceedings.

D. C.  
1907

BAXTER  
v.  
GORDON  
IRONSIDES  
AND  
FARES  
Co.

Anglin, J.



D. C.  
1907

BAXTER  
v.  
GORDON  
IRONSIDES  
AND  
FARES  
Co.

Anglin, J.

In *Beemer v. Beemer* (1904), 9 O.L.R. 69, the Court, while admitting, as sufficient, proof of an informal termination of proceedings before magistrates, adhered to the view that it must be shewn that the prosecution terminated favourably to the accused.

In no English or Canadian case do I find anything which casts doubt upon the soundness of Lord Tenterden's view that the plaintiff must shew such a termination of the proceedings taken against him as furnishes "*primâ facie* evidence that the action was without foundation."

In the absence of direct English or Canadian authority as to the effect upon his right to maintain suit for malicious prosecution of the dropping of the original proceedings as the outcome of a compromise or arrangement with the accused, I refer to some American authorities where this very point has been considered.

In *Emery v. Ginnan*, 24 Ill. App. Ct. 65, Moran, J., in delivering the judgment of the Court, says at p. 68: "To establish that the prosecution was so legally terminated as to permit the maintenance of this action, it was not necessary for appellee to shew that the merits had been determined in her favour; it was sufficient to shew the voluntary dismissal or abandonment of the prosecution by plaintiff in the action or proceeding. But where the proceeding is dismissed or abandoned by the procurement of the party prosecuted by settlement or compromise with the prosecutor or plaintiff in the action, it is not, it seems, such a termination of the proceeding as that a suit for malicious prosecution can be maintained.

"The termination must be such as does not admit a reasonable cause for prosecution."

This decision was followed in *Rosenberg v. Hart*, 33 Ill. App. Ct. 262, at p. 265. In *Langford v. Boston and Albany R.R. Co.* (1887), 144 Mass. 431, Morton, C.J., says: "Our cases uniformly hold that, where a *nolle prosequi* is entered by the procurement of the party prosecuted, or by his consent, or by way of compromise, such party cannot have an action for malicious prosecution."

In *Brown v. Randall et al.* (1869), 36 Conn. 56, the Supreme Court of Connecticut, *per* Carpenter, J., held that when a prosecution has been abandoned without any arrangement with the accused the question of probable cause may be left to the jury.

See also *Russell v. Morgan* (1902), 24 R.I. 134; *Parker v. Farley* (1852) 10 Cush. 279; *Atwood v. Beirne* (1893), 80 N.Y. 547 (73 Hun); *Gallagher v. Stoddard*, 54 N.Y. 101 (47 Hun); *M'Cormick v. Sisson*, 7 Cowen (N.Y.S.C.) 715; and *Loftus v. Meyer* (1903), 84 N.Y. Supp. 861 (118 N.Y. St. Rep.).

In *Craig v. Ginn* (1901) 94 Am. St. Rep. 77, the Supreme Court of Delaware, *per* Pennewill, J., said at p. 81: "The rule seems to be well settled that where the termination of the prosecution has been brought about by the procurement of the party prosecuted, or by compromise and agreement of the parties, an action for malicious prosecution cannot be maintained."

Having regard to the fact that the action for malicious prosecution, even where a case of civil process is the subject of complaint (*Goslin v. Wilcock* (1766), 2 Wilson 302, 307) is not to be favoured—and *a fortiori* this should be so on grounds of public policy, where it is sought to mulct a citizen in damages for having put the criminal law in motion: *Parker v. Farley*, 10 Cush. 279, at p. 281—we would, I think, establish a most dangerous and undesirable precedent were we to accede to the contention that upon any termination of criminal proceedings other than actual conviction, no matter by what means or in what manner procured, the accused may at once launch an action for malicious prosecution. The great weight of American authority is opposed to this proposition. English and Canadian authority support the view that the plaintiff must shew not only a termination of the alleged malicious prosecution, but a termination in his favour. In my opinion mere release as a result of compromise or agreement is not such a favourable termination.

It is unnecessary, in the view which I have taken upon this ground of appeal, to consider the further question raised, namely, that the defendant company could not be held liable for the prosecution of the plaintiff, instituted without instructions by Mr. Brown.

The appeal of the defendants will be allowed with costs and the judgment in favour of the plaintiff set aside and judgment entered for the defendants dismissing this action with costs, and in favour of the defendant company for the sum of \$255 upon their counterclaim also with costs. The latter item was omitted by inadvertence from the judgment at the trial, and this error is now rectified by consent.

D. C.  
1907  
BAXTER  
v.  
GORDON  
IRONSIDES  
AND  
FARES  
CO.  
Anglin, J.

## [DIVISIONAL COURT.]

D. C.

1906

May 21.

1907

Feb. 11.

LIVINGSTON V. LIVINGSTON.

*Reference—Solicitor—Master—Acceptance by Master of Retainer from one of the Parties—Disqualification—Setting Aside Reference.*

The firm of solicitors in which a local Master was a partner had accepted, pending a reference before the latter, a retainer from the defendant for some non-contentious business in the Surrogate Court:—

*Held*, that the reference and proceedings thereon must be set aside, for, without suggesting that there had been or would be any bias, the Master, as the solicitor even in a small matter for the defendant, a man of large business interests, might reasonably be suspected of bias.

Judgment of Anglin, J., affirmed.

THIS was an appeal by the defendant from the following judgment of Anglin, J., in which the facts of the case are fully stated.

The motion before ANGLIN, J., was argued in Weekly Court on May 5th, 1906.

*W. Nesbitt, K.C., and H. S. Osler, K.C., for the plaintiffs.*

*W. Barwick, K.C., and J. H. Moss, for the defendant.*

*W. E. Middleton, for the Local Master.*

May 21. ANGLIN, J.:—The plaintiffs move to set aside the reference herein to the Master at Berlin and all proceedings thereupon had before him. The ground of the motion is the acceptance by the firm of Scellen & Weir, solicitors, in which the Local Master is a partner, of a retainer from the defendant for some non-contentious business in the surrogate court of the county of Waterloo.

This action is brought for the winding up of the partnership which subsisted between the late John Livingston, who died on May 21st, 1896, and whose executors are the plaintiffs, and his brother the defendant, James Livingston. The judgment of reference was pronounced on March 27th, 1902. The proceedings before the Master have consumed nearly 100 hours, on 17 days, and involved an attendance by him at the city of New York. The accounts were taken by two expert accountants—one named by the plaintiffs and the other by the defendant. Upon all points on which they agreed their conclusions were by consent accepted.



Upon a number of points, on which the parties were at issue, the reference proceeded before the Master.

He took voluminous evidence, and on or about December 9th, 1904, sent to the plaintiffs' solicitors an unsigned document which contained a number of his findings upon points on which he was required to adjudicate between the parties. A duplicate of this document was sent to the solicitors for the defendant. The plaintiffs' solicitors immediately wrote the Master inquiring as to the nature and purpose of the document sent them and suggesting comparatively unimportant alterations. The Master in reply writes on December 12th: "If you return the copy of my findings, I will sign it and return it to you at once. I did not sign it because it is not my report, only the basis of my report, and it is not intended to be filed. The formal report on the terms of the judgment is the one usually filed. However, I will sign your copy if you wish it."

The partnership had been declared by the judgment of reference to have been dissolved by the death of John Livingston on May 21st, 1896. By agreement between the accountants, their statements had been prepared down to December 31st, 1898, to which date the business appears to have been carried on. This not being in conformity with the judgment, the plaintiffs' solicitors pressed to have the partnership accounts taken as of the date of the actual dissolution, May 21st, 1896, and for a separate account upon a proper footing of the transactions subsequent to that date. In his findings, which the Master on December 14th returned to the plaintiffs' solicitors duly signed, this paragraph appears: "These findings are subject to new accounts being filed as of the date of the death of John Livingston, if Mr. Osler still demands it." In this connection the defendant's solicitors had written to the solicitors for the plaintiffs, on December 13th, 1904: "The Master at Berlin has sent us a copy of his judgment, and has advised us he has asked you to arrange with us in reference to the accounts you require as of the date of the death of John Livingston. The Master says that he understands that the accountants are to prepare the necessary schedules for his formal report, and he asks us to see that this is arranged. We suggest that instructions be given to the two accountants to prepare these schedules. The Master says if any difficulty should arise between the accountants as to the making

D. C  
1906

LIVINGSTON  
v.  
LIVINGSTON.  
Anglin, J.



D. C.  
1906

LIVINGSTON  
v.  
LIVINGSTON.

Anglin, J.

up of the schedules on the basis of his findings, he will be glad to attend to settle any difficulties."

On December 15th the plaintiffs' solicitors write to the defendant's solicitors a letter containing the following sentence: "It does not appear to us that anything is needed to complete the report except the filing on behalf of your client of the additional accounts above referred to, and except also the calculation of interest on the Yale account, as to which we think the most satisfactory way of dealing with which (sic) would be for you to file a statement of interest shewing how the amount is calculated."

On December 15th the Master writes to Mr. Osler—a member of the plaintiffs' solicitors' firm—as follows:

"Since writing you yesterday with a copy of my findings, in this matter, I have been speaking with Mr. Barwick and Mr. Barwick has been speaking with me in regard to my indorsing these finding as 'interim reports.' He says, and I quite agree with him, that these findings are only my judgment in regard to the matters which were suggested in argument, and are not to be considered in any way a report, for which an appeal could be lodged. . . . As I stated in my former letter, these findings are simply for the purpose of settling the questions that arose on the argument, and are not to be considered a report at all, simply a judgment on which to make the formal report in the matter, as quickly as possible, and if the accountants cannot agree upon the necessary schedules, or you cannot agree with Mr. Barwick in regard thereto, *I will make an appointment for an early day, to consider the matters which require to be settled before the report can be made, and the schedules completed.* I ask you, therefore, under the circumstances, not to file these findings or take any action thereon until after the formal report is made, but simply consider the paper I have sent you my findings as to facts, and not either a report or an 'interim report,' which you suggested it should be called.

"I advised Mr. Barwick as to indorsing my findings 'interim report.' No doubt that is why he called me up to-day, lest I go astray on the matter of practice."

To this Mr. Osler replied, questioning the propriety of indorsing the document "interim report."

On December 20th the defendant's solicitors write again, stating that "it may be difficult to prepare additional accounts in relation

to the items in dispute without entirely re-casting the accounts filed."

On December 21st the plaintiffs' solicitors write: "We agree that it is advisable that the account above referred to should be put in final shape before an appeal is lodged if this can be accomplished without unreasonable delay. Assuming, therefore, that you will name an early date for the filing of these accounts, we may say that we do not intend in the meantime to file this report." On this same day the defendant's solicitors write: "The Master's judgment, of which he sent us both copies, is in no sense a report, and a formal report must necessarily be drawn up."

On September 30th, 1905, the defendant's solicitors filed the supplemental accounts prepared to meet the plaintiffs' requirements. On October 12th a "new account of John Livingston's drawings" was put in.

On December 6th the plaintiffs' solicitors write: "We have examined the further accounts submitted in this matter, but find it impossible to say whether the same are correct or not.

"These accounts are incomplete, in that while they take the accounts down to the date of the death they do not contain statements complying with the 4th clause of the judgment and carrying the accounts from the date of the death to the date of the reference, or to December 31st, 1898, the date as of which the accountants agreed to strike a balance.

"It appears to us that it would be necessary before any report should be settled to have such further accounts submitted *and have Mr. Spence give evidence as to how he arrived at the figures*, because there is nothing in the accounts themselves, or the evidence, to give the necessary explanation.

"We have explained the view we take of these accounts as above, because they have been in our hands for that purpose."

No further proceedings have been taken on the pending reference. Matters had almost reached this stage when the plaintiffs' solicitors were apprised of the retainer of the firm of Scellen & Weir by the defendant, upon which the present motion is based. The facts in connection with that retainer I take from the affidavit of the defendant.

The defendant Livingston resides at Baden; the firm of Scellen & Weir have their offices at Berlin. They had had no previous

D. C.  
1906

LIVINGSTON  
v.  
LIVINGSTON.  
Anglin, J.

D. C.  
1906  
LIVINGSTON  
v.  
LIVINGSTON.  
Anglin, J.

professional connection with the defendant. His affidavit states:

"18. The Master, Mr. Weir, never acted, nor did his firm ever act for me, as my solicitor, in any transaction, or in connection with any partnership business, or in respect of my private business, nor did I ever consult with him in relation to any business whatsoever, save as hereinafter mentioned.

"19. In the month of May, 1905, my daughter, Miss Caroline Livingston, having recently died intestate, my two sons went with me to Berlin for the purpose of arranging for the administration of her estate, and the three of us went together to the office of Scellen & Weir, for the purpose of instructing them to prepare and take out letters of administration. When we went to the office of the said solicitors it was my intention that one of my sons should act as administrator, but while we were there discussion arose, and my sons urged me to become the administrator, on account of my greater business experience, and it was accordingly arranged that I should take out letters of administration, and that they should become my bondsmen, and this arrangement was accordingly carried out.

"20. The total amount of costs paid to the said solicitors for their services in connection with the issue of the said letters of administration amounted to \$65, of which amount \$35 was disbursements. These costs also included the attendances and correspondence of the said solicitors arranging with reference to the succession duties upon the said estate, which was composed of stocks located in two of the States of the United States of America, and consequently involved considerable trouble.

"21. Some time previous to the occasion of the visit of my sons and myself to the office of Scellen & Weir, referred to in the two preceding paragraphs hereof, I had met the said Master, Mr. Weir, and in the course of a casual conversation he had informed me that the whole matter of the reference in this action was settled and disposed of, except that the accounts had been made up by the accountant, to the year 1898, and that under the judgment they would have to be made up to 1896. He also informed me that this was a matter which would be determined entirely by the accountants, and would not involve any further controversy.

"22. When I joined with my sons in employing the said firm of Scellen & Weir to act in connection with the estate of my daughter,



I did so in entire good faith, and without any reference whatever to or thought of the proceedings in this action, and attended at the office of the said solicitors and joined in employing them in the ordinary course of business, just as I might have employed any other solicitors in the country."

The surrogate court papers produced shew that Caroline Livingston died on February 24th, and the petition for letters of administration and the affidavits in support thereof bear date March 1st, 1905.

Upon the argument I declined to hear any suggestion that the Master's findings or his conduct indicated that he had been in anywise unduly influenced in the defendant's favour by the relations which had been established between them, because no such charge is made in the notice of this motion. I therefore deal with the matter solely upon the admitted fact that the Master accepted a retainer from the defendant before the reference pending in this action was finally concluded.

While, in respect of the matters covered by his findings contained in the document of December, 1904, the basis of the final report may have been then determined, I am not satisfied that the Master's remaining duties upon this reference are purely ministerial. On the contrary, it seems to me to be very clear that in respect of matters contained in the new accounts filed, and in respect of matters not fully covered by his findings in the document of December, 1904, the Master will still have duties of a judicial character to discharge. Moreover, the settlement of the report, in so far as it may proceed upon the findings made in that document, may require the exercise of judicial functions. I fully realize and much regret the expense which the making of the order asked for by the plaintiffs may entail, but a careful consideration of all the authorities cited and others fully supports the conclusion to which, apart from any authority, my view of the requirements of natural justice would have led me, namely, that the indiscretion of the Master permits me to take no other course than to remove him as referee in this action and to set aside all the proceedings had before him.

Section 148 of the Judicature Act, R.S.O. 1897, ch. 51, by implication permits the Local Master at Berlin to practice as a solicitor. But that statute was certainly not intended to sanction anything so abhorrent to natural justice as that a Local Master,

D. C.

1906

LIVINGSTON

v.

LIVINGSTON.

Anglin, J.



D. C.  
1906  
LIVINGSTON  
v.  
LIVINGSTON.  
Anglin, J.

while discharging judicial or quasi-judicial functions, should assume towards one of the parties the relation of solicitor to client, than which the law recognizes none to be closer and more confidential.

This is not the case of a voluntary reference by consent to the arbitrament of a person chosen by the parties, such as was dealt with in *Jackson v. Barry R.W. Co.*, [1893] 1 Ch. 238; and again in *Eckersley et al. v. Mersey Docks and Harbour Board*, [1894] 2 Q.B. 667; in *Re Haigh and London and North Western R.W. Co.*, [1896] 1 Q.B. 649; in *In re Hopper* (1867), L.R. 2 Q.B. 367; and in *Moseley v. Simpson* (1873), L.R. 16 Eq. 226, cited by Mr. Moss; and in *Bright v. River Plate Construction Co.*, [1900] 2 Ch. 835, referred to by Mr. Middleton. In the last mentioned case the distinction between an arbitrator named by agreement, under a voluntary submission, and another person filling a judicial position, which had been clearly pointed out in the *Eckersley* case, was again emphasized. In *Eckersley v. The Mersey Docks and Harbour Board*, [1894] 2 Q.B. 667, Lord Esher says at pp. 670-2: "When the proposition sought to be established on behalf of the plaintiffs is examined, it comes to this, that the disputes ought not to be referred to the engineer, because he might be suspected of being biassed, although in truth he would not be biassed. It is an attempt to apply the doctrine which is applied to Judges, not merely of the Superior Courts, but to all Judges—that, not only must they be not biassed, but that, even though it be demonstrated that they would not be biassed, they ought not to act as Judges in a matter where the circumstances are such that people—not necessarily reasonable people, but many people—would suspect them of being biassed. . . . It must, therefore, be shewn in the present case that it is, at least, probable that the engineer would be biassed."

Lopes, L.J., at p. 672, says: "Now, it is to be observed that the rule to be applied to a case of this kind is entirely different to that which is applied to Judges, magistrates, or any person in a judicial capacity, where the tribunal is not chosen by the parties who are sending their disputes to be settled by it, but is a tribunal constituted apart from any agreement or consent of the parties. Where the tribunal is not chosen by the parties, no doubt the rule is very strict. There is no principle better recognized than that a man is not to be a judge in his own case; and in the case of magistrates it is well established that, if there is any reason which, it can be

suggested, would influence the minds of ordinary persons, and induce them to think that the magistrates might be biassed, that will be sufficient to render the tribunal incompetent. But where the parties choose their own tribunal the case is very different."

But in our own Courts, even in the case of arbitrators voluntarily chosen, their fairness and impartiality has been scrupulously guarded against even suspicion of possible bias, and I doubt whether our Court of Appeal at the present day would follow the decisions in *In re Hopper* and in *Moseley v. Simpson*. In *Conmee v. The Canadian Pacific R.W. Co.* (1888), 16 O.R. 639, Rose, J., upon an admirable review of the authorities, set aside a voluntary reference to, and the award thereupon of the late Judge Clark, who had been offered the general solicitorship for the railway company and retained this proposition under consideration pending the arbitration, although the learned Judge found that the arbitrator had not consciously acted under the influence of any bias in favour of the railway company. This decision is approved by the Court of Appeal in *Vineberg v. Guardian Fire and Life Assurance Co.* (1892), 19 A.R. 293, which was followed by Meredith, J., in *Corporation of the Township of Burford v. Chambers* (1894), 25 O.R. 663. At p. 667 the learned Judge indicated what must, I think, be, in the case of arbitrators voluntarily chosen, as well as in that of other judicial officers, the true rule, when he says: "The rule adopted here appears to be that an arbitrator is unfit to act in any case in which he might be suspected of a bias in favour of or against one of the parties, unless indeed the parties have, by their agreement, otherwise indicated, as they often do for instance in building agreements. See *Eckersley v. The Mersey Docks and Harbour Board*." This is, in my opinion, the true explanation of such decisions as are found in the *Eckersley* case, the *Bright* case, the *Jackson* case, and in *Re Clout and Metropolitan and District R.W. Co.* (1882), 46 L.T. 141. The parties in these cases were taken to have had in contemplation when selecting their tribunal the very objection to it upon which they afterward sought to impeach its competence and impartiality. This is well put by Davey, L.J., in the *Eckersley* case. See, however, *Re Christie and Town of Toronto Junction* (1894), 24 O.R. 443, at p. 445. Where there is ground for suspicion of bias, which the objecting party could not have had knowledge of or anticipated, such as was the offer of the solicitorship to Judge

D. C.  
1906  
LIVINGSTON  
v.  
LIVINGSTON.  
Anglin, J.

D.C.

1906

LIVINGSTON

v.

LIVINGSTON.

Anglin, J.

Clark pending the arbitration in the *Conmee* case, the agency of the adjuster in the *Vineberg* case, and the assurance given by the architect to the owner in *Kemp v. Rose* (1858), 1 Giff. 258, and upon which he has not waived his right to rely, as an objection to the arbitrator's competence, I cannot see on what principle there can be any sound distinction drawn between an arbitrator named by the parties to a voluntary submission, and any other person discharging judicial functions: See Russell's *Power and Duty of an Arbitrator*, 9th ed., pp. 93-6; Redman's *Arbitrations and Awards*, 4th ed., p. 116.

That *In re Hopper* and *Moseley v. Simpson* appear to be not in line with the rule adopted in our Courts, I have already stated. See too, *Dobson v. Groves* (1844), 6 Q.B. 637, at p. 648, and *Harvey v. Shelton* (1844), 7 Beav. 455, 462.

But, whatever divergency of view there may be as to arbitrators voluntarily chosen by parties, the authorities are uniform that an officer of the Court, upon whom judicial duties are imposed in the ordinary course, and as the tribunal constituted by law for the purpose, cannot be permitted to discharge such functions in circumstances where the faintest breath of suspicion of bias or partiality might arise.

In *Race v. Anderson* (1886), 14 A.R. 213, after an arbitrator had taken all the evidence and prepared a written judgment of his findings, which only required his signature to complete it, one of the parties sent him a letter containing an affidavit bearing on some matters in question on the reference. The arbitrator swore that his award was what he had previously embodied in his written findings, and was in no way affected by the letter or affidavit, which he would have returned immediately had he not thought it better to place them without filing them or treating them as evidence amongst the papers, so that it could not be said he had in any way concealed the fact of their having been sent to him. The good faith of the referee was not questioned, and the Court "fully believed the referee's statement that he was not influenced by this communication." Nevertheless, the award was set aside, the Court observing that "in this particular case it may be somewhat of a hardship, but the leading principles that govern references to arbitration must be preserved inviolate." The action had been tried with a jury and a verdict returned for the plaintiff, subject to the award of the Local Master at Guelph. The resemblance to



the present case is close. But that judicial duties are still to be discharged in this case by the Master at Berlin is, I think, much clearer than that the Master at Guelph had such functions to perform in *Race v. Anderson* after receipt of the letter and affidavit.

As put by Rose, J., in *Connie v. Canadian Pacific R.W. Co.*, 16 O.R. 639, at p. 655: "It will never do to allow it to go abroad that the Courts treat lightly and as of little moment that one of two litigants may approach a judicial officer, pending the litigation, to open negotiations for any profit or advantage to such Judge. It is better that they should know that such conduct, when complained of before the Court, will lead to the setting aside of the award 'as a lesson to all persons in future not to adopt that line of conduct.'"

The reference to the Local Master at Berlin and all proceedings had before him must therefore be set aside, and this reference transferred to the county court Judge of the county of Waterloo as official referee, unless the parties agree upon some other officer of the court as referee.

Much time and expense may be saved if the parties can agree that the new referee may treat the evidence already taken as taken before him. Unless it is important that the referee should have an opportunity to form an opinion as to the credibility of witnesses from their demeanour in giving evidence, this can probably be arranged. There can be no good reason why the work already done by the accountants should be duplicated.

As the present unfortunate situation is wholly due to an act, however innocent, of the defendant, he must pay to the plaintiffs their costs of this motion and of all the proceedings subsequent to the judgment of reference which shall have been lost through the making of the order now pronounced.

The appeal was argued on January 21st and 22nd, 1907, before FALCONBRIDGE, C.J.K.B., BRITTON, and RIDDELL, JJ.

*S. H. Blake*, K.C., and *J. H. Moss*, for the defendant, contended that the Master had arrived at his conclusions in this case before the relationship complained of had arisen; that there was nothing here to induce a bias or cause what was unfair to be done, and no reasonable or substantial ground for suspecting bias, and thus

D. C.  
1906

LIVINGSTON  
v.  
LIVINGSTON.  
Anglin, J.



D. C.  
 1907  
 LIVINGSTON  
 v.  
 LIVINGSTON.

the case was not within the principle relied on: *Allinson v. General Council of Medical Education and Registration*, [1894] 1 Q.B. 750, at p. 759; *Leeson v. General Council of Medical Education and Registration* (1889), 43 Ch.D. 366, at p. 384; *The Queen v. Farrant* (1887), 20 Q.B.D. 58; that in any event the defendant was being penalized for a misdirection of the Master; that the Master here was under statute permitted to continue his private practice, and that unless he did so corruptly it could not be a ground for disqualification: *Bright v. River Plate Construction Co.*, [1900] 2 Ch. 835; *Rex v. Sunderland Justices*, [1901] 2 K.B. 357, 371; *In re Hopper*, L.R. 2 Q.B. 367, 374; *In the Matter of Hick* (1819), 8 Taunt. 694; *Race v. Anderson*, 14 A.R. 213; *In re Cruikshank v. Corby* (1880), 30 C.P. 466; *Vineberg v. Guardian Fire and Life Assurance Co.*, 19 A.R. 293; *Re Christie and Town of Toronto Junction*, 24 O.R. 443, 445; *Corporation of the Township of Burford v. Chambers*, 25 O.R. 663.

*Wallace Nesbitt*, K.C., and *H. S. Osler*, K.C., for the plaintiffs, contended that a referee before whom a matter is pending has no right to accept retainers from one of the parties no matter in how trifling a matter; and that even a jealous suspicion that proper justice will not be obtained is quite sufficient ground to set aside the reference: *Bigelow v. Bigelow* (1873), 6 P.R. 124; *Egerton v. Earl Brownlow* (1853), 4 H.L.C. 1, *per* Lord St. Leonards at p. 246; *McLean v. Cross* (1871), 3 Ch. Ch., 432; Ontario Judicature Act, R.S. O. 1897, ch. 51, sec. 148; and the cases cited in the judgment appealed from.

February 11. FALCONBRIDGE, C.J.:—I have nothing to add to the very careful judgment of my brother Anglin.

In affirming it I venture to say that in my humble opinion the standard has not been pitched too high by the cases which amply support his conclusions, and I also venture to hope that judicial officers and others will find no difficulty in living up to it.

We have delayed the pronouncing of this judgment, not by reason of any doubt being entertained as to the proper disposition of the appeal, but in order to consider what, if anything, could be saved to the parties out of the wreck. My brother Riddell and I are of opinion that all that can be done in that direction is to order that the evidence taken on commission, the work of the

accountants and the documentary evidence shall stand, and the costs of these items shall be reserved from the general order and shall be dealt with on the motion for further directions after the new referee shall have made his report.

In all other respects the appeal will be dismissed with costs.

BRITTON, J.:—This is an appeal by the defendant from the decision of Anglin, J., setting aside the reference to the Local Master at Berlin and all proceedings thereupon had before him on the ground of the acceptance by the firm of solicitors in which the Local Master was a partner, of a retainer from defendant for some non-contentious business in the surrogate court of the county of Waterloo.

The learned Judge at the outset makes this short and very clear statement: "Upon the argument I declined to hear any suggestion that the Master's findings or his conduct indicated that he had been in any wise unduly influenced in the defendant's favour by the relations which had been established between them because no such charge is made in the notice of this motion. I therefore deal with the matter *solely upon the admitted* fact that the Master accepted a retainer from defendant before the reference pending in this action was finally concluded."

Upon the argument it was contended by counsel for the appellant that in any case, where the interest of the arbitrator or referee or judicial officer was not a pecuniary interest in the subject matter of the litigation or in the result of the litigation, then bias if alleged must not, or need not be, inferred but must be proved.

In the reasons for judgment below, and in the cases cited, the distinction is drawn between the case of an arbitrator in a voluntary submission and an arbitrator or referee or judicial officer in a compulsory reference.

The case of *Allinson v. General Council of Medical Education and Registration*, [1894] 1 Q.B. 750, was relied upon in support of defendant's contention. That case appears to me to support the judgment appealed from.

The judgment of Lord Esher, M.R., is that where a person who has sat in judgment on a case has any pecuniary interest in the result, however small, the Court will not inquire whether he was really biassed, or likely to be biassed,—“The Court will say at once

D. C.  
1907

LIVINGSTON  
v.  
LIVINGSTON.

D. C.

1907

LIVINGSTON

v.

LIVINGSTON.

Britton, J.

it is against public policy that a person who has any monetary interest, however small, in the result of judicial proceedings, should take part in them as a Judge": p. 758.

*Leeson's* case is cited, 43 Ch.D. 366, as shewing that there are other relations to the matter of a person who is to be one of the Judges, which may incapacitate him from acting as a Judge.

Lord Esher goes on to say (p. 758): "The question is to be one of substance and fact in the particular case—What is the fact which has to be decided? If his relation be such that by no possibility he can be biassed, then it seems clear that there is no objection to his acting. The question is not whether in fact he was or was not biassed. . . . In the administration of justice, whether by a recognized legal Court or by persons who, although not a legal public Court, are acting in a similar capacity, public policy requires that, in order that there should be no doubt about the purity of the administration, any person who is to take part in it should not be in such a position that he might be suspected of being biassed. To use the language of Mellor, J., in *Queen v. Allan* (1864), 4 B. & S. 915, at p. 926: "It is highly desirable that . . . justice should be administered by persons who cannot be suspected of improper motives . . . . I think that if you take that phrase literally it is somewhat too large, because I know of no case in which a man cannot be suspected. There are some people whose minds are so perverse that they will suspect without any ground whatever. The question of incapacity is to be one 'of substance and fact,' and therefore it seems to me that the man's position must be such as that in substance and fact he cannot be suspected. Not that any perversely minded person cannot suspect him, but that he must bear such a relation to the matter that he cannot reasonably be suspected of being biassed. I think that for the sake of the character of the administration of justice we ought to go as far as that, but I think we ought not to go any further." This covers the whole ground. Could the Master be reasonably or substantially suspected of bias in this case? Not by a man who suspects every person, and who smells fraud in every transaction—nor on the other hand is the matter to be dealt with because a person who knows no guile and who suspects no person, sees no danger of bias—but could the Master be reasonably suspected of bias, by the ordinary person of average intelligence and capacity?



Considered in that way, I am of opinion that the Master, as the solicitor, even in a small matter, for the defendant, who is a man of large business interests, might reasonably be suspected of bias, and in saying this I do not for one moment say that there has been or would be any bias in fact in favour of the defendant.

In *Race v. Anderson*, 14 A.R. 213, the then Chief Justice of Ontario quotes with approval from Russell on Awards, ed. 1878: "An arbitrator cannot be too scrupulous in guarding against the possibility of being charged with not dealing equally with both parties. Neither side can be allowed to use any means of influencing his mind which are not known to and capable of being met and resisted by the other."

This case, which seems very much in point, was considered and commented on by the Judge appealed from.

I agree that the appeal must be dismissed.

As to terms, speaking for myself, and in this respect differing from the other members of this Court, I am of opinion that as no bias has been established all the evidence already taken should be allowed to stand, to be supplemented if necessary by additional evidence by either party. That the cost of all the oral testimony already given, except that taken under commission, should be thrown upon the defendant, and that such a mass of evidence should be repeated, seems to me quite unnecessary.

It was stated upon the argument by counsel for the plaintiffs that a good deal of the evidence need not be repeated. If so, no harm would be done by allowing it to stand; but in any event I hope by agreement of counsel something may be saved of work already done.

RIDDELL, J.:—I have read the judgment of Mr. Justice Anglin in this case, and I agree with him in all that he has said. There is not much to add.

Whatever may be the rule in cases of arbitration upon voluntary submission, (and as at present advised, I think such cases as *In re Hopper*, L.R. 2 Q.B. 367, should not, in view of the *Vineberg* case in 19 A.R., be followed) the care with which the Court surrounds its own officers, situated as the Master is here, is shewn by such cases as *McLean v. Cross*, 3 Ch. Ch. 432, and *Bigelow v. Bigelow*, 6 P.R. 124.

D. C.  
1907

LIVINGSTON  
v.  
LIVINGSTON.  
Britton, J.



D.C.  
1907  
LIVINGSTON  
v.  
LIVINGSTON.  
Riddell, J.

I am glad to be informed that no such motion has been made, so far as known, either in England or Ontario, for fifty years. No doubt the rule has been well recognized and there has been no necessity for such a motion.

It is a matter of regret that judicial officers like a Master should ever practice as a solicitor. This is a matter for the Legislature. The difficulty may be avoided by the appointment of county Judges or of gentlemen who will undertake not to practice. This is for the advisers of His Majesty. But in any case, I trust the time will never arrive when it can be called only a "counsel of perfection" to say that a Master who does practise as a solicitor must not, pending a reference before him, accept a retainer from a party to such reference, no matter how trifling the remuneration or how small the amount of work to be done.

I concur in the judgment of my Lord.

A. H. F. L.

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[MEREDITH, C.J.C.P.]

THE INDEPENDENT CORDAGE COMPANY OF ONTARIO, LIMITED,  
AND  
HIS MAJESTY THE KING.

1906  
Oct. 26.

*Parliament—Provincial Legislature—Contract Authorized by Resolution of—  
Effect of—Modification of by Order-in-Council—Executive Government—  
Claim on—Effect of Decision of Court—Rights Under Contract.*

The Government of the Province of Ontario, through its Inspector of Prisons, entered into a contract, authorized and approved of by a resolution of the Legislature, for the manufacture of twine in the Central Prison, utilizing prison labour, which contract was assigned to a company with the consent of the Lieutenant-Governor-in-Council. After the assignment, and during the currency of the contract, the workshops and machinery were destroyed by fire and the work stopped. A new agreement with the company was then entered into, authorized by orders-in-council, but not approved of by the Legislature, for the furnishing new machinery, etc. On the trial of a petition of right, in which the company claimed balances as due after a termination of the contract:—

*Held*, that while a judgment of the Court would be wholly inoperative, so far as any payment to the contractor of the amount found due was concerned, unless the Legislature should appropriate the money, the original agreement was within the authority of the Executive Government of the Province and did not require the ratification of the Legislature to give it contractual validity, and that the later agreement was a new agreement, which also was within the authority of the Executive Government, as well as any changes or modifications in either.

*Held*, also, on the evidence, that after accounts had been taken on a certain basis occasioned by a change in the contract, it was too late to re-open them.

2. That parties are not entitled to interest as of right, and as in the transactions between the parties here, interest was not charged by the Government, as they now sought to charge it, that claim could not be allowed.
3. That although insurance was not provided for in the agreement and the machinery was purchased by the company, it was subsequently to become the property of the Government, and so was substantially a purchase by the Government, and as insurance had been allowed to the company in the accounts, it was too late to object to such allowance now.
4. That accounts rendered, checked and entered in the prison books, there being no fraud or concealment, should not be disturbed.
5. That the contract did not call for the payment of additional men supplied beyond the original number contracted for, and there was no implied contract for their payment as on a *quantum meruit*.

While not necessary to determine the case, the Court was of opinion that the resolution of the Legislature ratifying the contract did not give the contract the force of a statute of the Province, and there was no intention it should, and even if it did, that the Executive Government had power to modify it.

THIS was a petition of right in which the Independent Cordage Company of Ontario, Limited, were suppliants, and His Majesty the King was respondent.

1906

IN-  
DEPENDENT  
CORDAGE  
Co.  
AND  
THE KING.

The petition, on which was indorsed the fiat of His Honour William Mortimer Clark, Lieutenant-Governor of the Province of Ontario, set out a contract in writing dated the 25th of September, 1895, between one Connor and the Inspector of prisons and public charities, for the manufacture by Connor of binder twine in the cordage building of the Central Prison, using the labour of the prisoners, an assignment of all his interest in the agreement by Connor to one Field, and a similar assignment by Field to the Cordage Company, both of which assignments were with the consent of the Lieutenant-Governor-in-Council; that both Connor and Field had fulfilled their part of the contract and everything had been settled and adjusted between them and the said Inspector.

That in the year 1897 the cordage building and the machinery, which belonged to the Government, were destroyed by fire, and the work was suspended for upwards of a year.

That it became necessary to provide new machinery, and a new agreement in writing dated the 28th of October, 1898, was entered into between the Inspector of prisons and the Cordage Company, which was approved of by the Lieutenant-Governor-in-Council and laid upon the table of the House in due course, under which the Cordage Company advanced large sums of money for the purchase of new machinery and continued to manufacture until the 1st of October, 1905.

That by a certain other agreement dated the 25th of August, 1904, the said last mentioned agreement was extended for five years on certain conditions, one of which was a right to the Government to terminate the contract on notice, which notice had been given to terminate it on the 1st of November, 1905.

That accounts had been balanced and adjusted between the Inspector and the company in the years 1902, 1903 and 1904, shewing balances against the company which had all been paid, and a balance of \$1,686.42 was due from the company up to the said 1st of November, 1905.

That in the adjustment of accounts in the years 1902, 1903 and 1904 large balances had been found due to the company for moneys advanced for the purchase of the new machinery, and that the balance due on the 30th of September, 1905, was \$9,903.10, from which should be deducted the \$1,686.42, leaving a balance of

\$8,216.68 due the company, and the company claimed that amount, \$8,216.68, and a return of \$5,000 which had been deposited with the Government as security for the proper performance of the contract.

The statement of defence on behalf of the Attorney-General of Ontario set out the original agreement of the 25th of September, 1895, and claimed that its ratification by the Legislative Assembly had the effect of giving it the force of an Act of Parliament, and that it could not be altered or amended except in the same manner; and that the assignments even, if with the consent of the Lieutenant-Governor-in-Council, only assigned the rights of Connor, unaffected by the Government; and that although the fire did occur, that neither it nor the subsequent agreements made any alteration in the relations between the Government and the contractor; and denied the settlement and adjustments of the accounts; and counter-claimed for the services of prisoners, in excess of the number stipulated for in the contract.

The action was tried at Toronto on the 25th and 26th of October, 1906, before MEREDITH, C.J.C.P., without a jury.

*F. E. Hodgins*, K.C., for the Crown, contended (1) That the original contract was beyond the powers of the Inspector of prisons under sec. 12 of R.S.O. 1897, ch. 321, and for that reason required ratification by the Legislative Assembly, and having been so ratified became in effect a statutory contract between the Province and the contractor. A statute is the concurrence of the two estates, namely, the King and the Legislature, and need not be in the form usually adopted, *viz.*, by statute, and that such concurrence may be effective if the Crown submits a contract, to which it has agreed, to the Legislature which thereupon ratifies it: *Chitty*, *Prerogatives of the Crown*, 75; *The Princes' Case* (1606), 8 Rep., I a, p. 145; *May's Parl. Prac.*, 10th ed., 431, 432; *Hales' History of the Common Law*, p. 3, note; *Coke upon Littleton*, 98 b. (2) That the new contract involved a serious departure from the policy sanctioned by the original ratified contract, namely, the providing of rope-making machinery and the making of rope suitable for all purposes (not provided for in the original contract), instead of binder twine for the supply of the farming community, and thus involved the Province in an enterprise, not contemplated nor sanctioned by the

1906  
IN-  
DEPENDENT  
CORDAGE  
Co  
AND  
THE KING.



1906  
IN-  
DEPENDENT  
CORDAGE  
Co.  
AND  
THE KING.

Legislative Assembly, and diverted the revenue provided for in the original contract to pay for the additional rope-making machinery; that this affected and diminished the revenues of the Crown and was virtually a device to avoid asking for an appropriation to purchase such machinery; that such a contract was beyond the power of the Executive to make: Bourinot's Parliamentary Procedure, 3rd ed., 570; Todd's Parliamentary Government, 2nd ed., 468, 488, 489; May's Parliamentary Practice, 10th ed., 568. (3) That no contract involving a money liability upon the Crown can be operative unless and until an appropriation has been made by the Legislative Assembly, and that the orders-in-council were ineffective to bind the Crown: Todd's Parliamentary Government in England, 2nd ed., 457, 459, 489, 490; *The Quebec Skating Club v. Her Majesty the Queen* (1893), 3 Ex. C.R. 387; *Churchward v. The Queen* (1866), 14 L.T.N.S. 57; History of the Contract, in Todd *supra* 2nd ed., p. 772 *et seq.* (4) That the original contract could not be modified by order-in-council, as otherwise any contract ratified by the Legislative Assembly could the day after prorogation be altered by the Executive of the day and the policy which the Assembly had adopted could be thus reversed without its knowledge: Todd, 2nd ed., 465, 466, 467, 766; Mr. Gladstone in Hansard Debates, vol. 157, p. 1412. (5) A court of justice may inquire into the validity of any order-in-council: Todd, 2nd ed., 461; *Starrs v. Her Majesty the Queen* (1887), 1 Ex. C.R. 301; *Piggott v. His Majesty the King* (1906), 10 Ex. C.R. 248. (6) The Crown is not estopped by any opinions or conclusions of its officers, nor *semble* by acts done in consequence of the same: *Robert v. His Majesty the King* (1904), 9 Ex. C.R. 21.

*George C. Gibbons, K.C., and C. A. Moss, for the suppliants, were not called upon.*

At the close of the case the following judgment was delivered:

October 26. MEREDITH, C.J.:—This case has been argued with reference to parliamentary practice, and as if the undoubted rule that no money can be paid out of the consolidated revenue fund except after its appropriation by Parliament were applicable to the questions presented for decision.

With those considerations I have nothing to do. I have simply to determine whether, upon the facts as proved, there is a liability on the part of the Province to the suppliants, and it will be for the Executive and Parliament to take such action upon the decision of the Court as in their judgment may seem proper. As I understand it, any judgment of the Court will be wholly inoperative so far as any payment to the suppliants of the amount found due is concerned unless Parliament appropriates the money for that purpose.

It is not necessary, I think, for the purpose of this case, to determine whether Mr. Hodgins' argument that the original contract with Connor, having been ratified by vote of the Legislative Assembly, has the force of an Act of Parliament, is well founded or not.

The circumstances under which the contract of 1898 was entered into were these. The Connor company had a contract which had not then expired. In some way the gentlemen, who were ultimately interested in the suppliant company, had made arrangements for taking over this contract and the benefit to be derived from it. A person by the name of Field, acting for the promoters of the company, had been admitted to carry on the business and Connor had gone out. Field carried on the business for several months, and ultimately the company was incorporated and took it over.

Now, it is to be borne in mind, that there was no obligation on the part of the Province to enter into this contract. The Province was in no way bound to confirm the arrangements between these parties. It is therefore, I think, obvious that that agreement must be treated as a new one with the new partners, incorporating, it is true, most of the provisions of the old agreement, but modified to some extent. It would be an extraordinary thing morally, that where persons in the position of the promoters of this company had entered into negotiations with the Government upon the faith of which, according to the evidence of Mr. Hobbs, they had undertaken obligations which they would not have entered into but for the new agreement—the modifications (as they are called) of the old agreement—that the Government should be at liberty to recede from the agreement that was then entered into. Therefore I think the case is not one, in which any difficulty (if there

Meredith, C.J.

1906

IN-  
DEPENDENT  
CORDAGE  
Co.  
AND  
THE KING.

Meredith, C.J.

1906

IN-

DEPENDENT

CORDAGE

Co.

AND

THE KING.

be any difficulty at all) arises by reason of the original agreement having been sanctioned by the House, and therefore, as Mr. Hodgins contends, having the force of an Act of the Legislature.

Then, if that be so—if this is to be treated as a new agreement—I have no doubt whatever that it was within the authority of the Executive Government of the Province to enter into it.

The Government had charge of this prison. It was part of the policy of the Province that the prison labour should be utilized. One of the very objects of the erection of the prison was to avoid what had taken place in the past—prisoners idling in the county jails—and to provide a place where their labour should, to some extent at all events, be made remunerative, and so relieve the general public to that extent from the burden of their maintenance. Therefore it seems to me that it was within the authority of the Government to enter into such an agreement as the first agreement with Connor, and the second also, and that ratification by the Legislature was not necessary to give contractual validity to the agreement. The agreement with Connor was no doubt submitted to the Legislative Assembly, because it was an important part of the administration of the public service of the country, and the Government was desirous that the Legislature should give its approval to the policy that it was adopting, before that policy was given effect to. The agreement provided that it should not go into operation until it had been submitted to and had been ratified by the Legislative Assembly. Then, if I am right in that view, it gets rid of all the difficulties in the case raised by the Crown except those relating to the orders-in-council.

I am unable to follow the argument of the learned counsel for the Crown with regard to that matter. If it was competent for the Crown to make the agreement, surely, if in the working out of that agreement it became in the judgment of the advisers of the Crown, desirable that modifications should be made in the terms of the contract, it was within the power of the Government to make those changes. It is not necessary, in the view I take of the contract, to say anything further on that question, but it seems to me that even if this agreement had the effect of a new contract, if, in working out its terms relating to the repairs (which were, it is true that the repairs should be borne by the contractors, but also provided that they should be done in the Central



Prison by the prisoners, the materials and the prisoners' time being charged for) it was found that as according to the report of the Inspector, had been the case, it caused friction, and was difficult to carry out,—it was competent for the Crown and the contractors to modify it. In the course of the discussion of the case, it had been pointed out that there is a great deal of difficulty in determining what the exact meaning of the language is, it being that the materials are to be paid for and charged at the rate of one dollar per day for the prison labour. As I understand it, although it does not appear in the Inspector's report that that was dealt with by him, the view of the contractors was that that meant one dollar for all the prisoners that were employed; and that the view on the other side was that it was one dollar per day for each prisoner who was employed in making the repairs. I think it was perfectly competent to make that modification in the detail of the agreement, not at all altering the essential terms of it, still leaving the contractors to bear the expense of the repairs, relieving the Government of the necessity of keeping track, in the way it had been doing, of the materials and of the prison labour, and of the conflicts and disputes as to the amount of time and the amount of material employed, and possibly too, as the evidence indicates, as to what came within the definition of the term "repairs." There was then substituted for that arrangement a provision by which, in lieu of the one I have just referred to, the contractors were to pay a dollar and a quarter for each ton of the output of the factory.

I may as well refer at this point to another position taken by Mr. Hodgins: that this provision was not retrospective. The evidence is that after that modification was provided for, instructions were given to the Central Prison officers to recast the accounts from the beginning on that basis, and that was done. Whether on the construction of the document that was its meaning, it is not necessary to consider. That arrangement was made, and the transaction was carried out on that basis between the parties, and it is now entirely too late to raise the objection and to seek to have all that has been done reopened and changed.

Objection is taken to the item of commission. It appears that under the terms of the agreement machinery was to be purchased. The contractors, the suppliants, were directed or authorized by the Government to purchase the machinery required for the use

Meredith, C.J.

1906

IN-  
DEPENDENT  
CORDAGE  
CO.  
AND  
THE KING.



Meredith, C.J.

1906

IN-

DEPENDENT  
CORDAGE  
Co.AND  
THE KING.

of the factory, which was being leased, or which it was permitting, the contractors to use in the Central Prison, and it was agreed that there should be paid to them five per cent, as a commission for their trouble and expense in arranging and looking up the machinery and in making the contracts for it. I have no doubt from the evidence that that was a fair and reasonable agreement.

The amount was but a few hundred dollars, perhaps three or four hundred dollars more than it was sworn was actually expended for travelling expenses, to say nothing of the time which was employed in travelling throughout the United States and in Europe making investigations with a view to securing the best kind of plant for the purpose required. It is true that there is nothing in the contract that says that that is to be paid for by the Crown ultimately. The provision is as to the cost. Surely it is no violent straining of the language of the agreement to include five per cent. that was paid to W. R. Hobbs & Company—not charged by the suppliants themselves—as part of the cost of the purchase of the machinery.

Then there is objection taken also to the charges that have been made and have been allowed in respect of the expenses of Berry and of some others who were employed, as the parties treated them throughout the accounts, in the installation of the new plant. I think that objection also fails. Upon the evidence it was necessary that an expert should be got from abroad. Possibly the Government might not have succeeded in getting the expert who was got by the suppliants. They had such relations with the Plymouth Company, the largest manufacturers, it is said, on this side of the water, in that branch of business, that they were able to get from them the services of one of their employees, and to obtain (although this does not bear upon this branch of the case), free of charge, specifications for the new machinery. Berry was employed at four dollars a day, and, according to the testimony of Mr. Hobbs (which is uncontradicted) during the whole of the time that he was at the factory and for which his salary has been charged, he was looking after the installation of the machinery. It is shewn that the installation of the machinery did not mean simply the fastening down of the machines (if they had to be fastened down), but castings had to be made from wooden models, and complicated arrangements had to be made for the purpose of enabling the plant to be put in proper running order. There is nothing

that I have heard that would justify the disallowance of any part of the charge that is made for the disbursements to Mr. Berry, and nothing has been adduced which would justify, I think, even if it were open to me to do so, the disallowance of the charges in respect of the other persons who were employed about the same work.

Then objection is taken to two other matters that are not covered by the terms of the agreement or by any order-in-council. One is the question of interest. It is said that interest has been charged on one side and has not been allowed upon the other, and that there should have been a considerable credit on interest account to the Province. The exact amount appears from the statements which Mr. Brown, one of the officers of the Audit Department, prepared from a calculation made by him. It is a sufficient answer to that position, I think, to say that interest is not something that the parties are entitled to as of right. The right to interest under our statute in transactions between party and party depends upon whether the money in respect of which it is charged is payable upon a particular day, and on certain other circumstances not applicable to this case. And interest may be allowed where it is usual for a jury to allow interest. Now, in this case the practice throughout in the transactions between the parties was not to compute the interest in the way the Crown now seeks to have it computed. The provincial auditor did not deal with the accounts on that basis. I think it is impossible to say that what was done can be undone and a charge for interest such as the Crown now seeks to make allowed.

With regard to the item of insurance, there accompanied the agreement a memorandum written by Mr. Dewart, who was acting for the company, in which he pointed out that there were certain matters which were understood between the parties and not embodied in the agreement, and he desired to have an assurance from the Inspector that they were matters that were arranged between the Crown and the contractors, although they were not inserted in the agreement. One of these was a provision that there should be insurance upon joint account. The machinery that was purchased and put into the prison by the contractors was insured, and the premiums of insurance were from time to time allowed in the settlement between the officers of the Crown and the contractors. It was argued by Mr. Hodgins, that there

Meredith, C.J.

1906

IN-  
DEPENDENT  
CORDAGE  
Co.  
AND  
THE KING.

Meredith, C.J.  
1906  
IN-  
DEPENDENT  
CORDAGE  
Co.  
AND  
THE KING.

was no right to make that allowance—that the property was really the property of the contractors—that it was an insurance for their benefit. I think that is altogether too narrow a view to take. Although in form it was their property, although in form they had purchased and the Government was to repurchase, yet the transaction was in substance an advance by the contractors of the money required to purchase the machinery. The Province paid six per cent. interest upon the amount from time to time remaining due on account of the purchase money by deducting certain payments which had been made depending upon the output and in reference to a probable output.

Substantially, I think, that was a purchase by the Government, and it was certainly not inequitable, that the cost of insurance upon the property should be borne by the Government. It was not something that would wear out in the time during which the agreement was to be on foot; it was something of a permanent nature; and it would be necessary for the Government to have it after the agreement came to an end, in the event of its continuing the work or making with others a similar contract. The Government throughout has recognized that right. It has allowed the contractor the premiums paid in all the accounts that have been passed. It is entirely too late to raise an objection to that item.

The observations I have made with regard to the interest and the insurance are applicable to the other matters.

Accounts were furnished from time to time and balances struck. Not accounts simply furnished by the Cordage Company and accepted by the Government, but accounts were furnished, and, after proper checking, entered in the books of the Central Prison. These were treated as the accounts between the parties, as evidencing the condition of matters, and the substance of what was done was that the disbursements which are now attacked, which the suppliants were making, were periodically settled by the Crown by the deduction of them from the gross indebtedness on account of the rental (if it may be so called) which the suppliants were to pay. Even in the case of private individuals it would be impossible to disturb a transaction of that kind—no fraud, no concealment, the persons acting at arms-length—and it seems to me an extraordinary proposition that the Court should be asked to review the discretion which has been exercised by the Crown in regard to these matters



and to substitute for that discretion its own view of what ought to have been done under the circumstances. Meredith, C.J.

I have nothing to do with the policy of these matters. That is a matter wholly outside of this inquiry and is for the Executive Government of the Province to deal with. The remedy, if wrong has been done, is to be found in the Legislative Assembly acting, and ultimately by appeal to the final court of appeal—the people of the Province.

I think that disposes practically of all the matters that have been discussed, except the matter of a payment for prisoners in excess of those that, under the terms of the contract, the contractors were entitled to who were engaged in the work. By the terms of the contract each prisoner was to turn out 130 pounds in a working day. Of course, if that had been found practicable, the result would have been that a much less number of men would have been required for the purpose of turning out the output. But it is manifest from the correspondence, and from the evidence of the Inspector, that at the outset it was found that it was quite impracticable to get prison men to do that amount of work, and deductions were made from time to time, with protests on the one side by the Inspector, and demands on the other from time to time for more men. It never occurred to anybody that any charge should be made in respect of the additional men. That item of the claim was not very strenuously opposed by Mr. Hodgins. He appealed to some very general words of the agreement; but it seemed to me that he had not very much faith in that branch, at all events, of the claim which has been set up. I think it is impossible to come to the conclusion that those general words amount to an agreement entitling the Crown to be paid for the additional men at the rate of fifty cents per day or at any other rate and that the circumstances entirely rebut any inference that there was an implied contract on the part of the suppliants to pay for the service of the additional men on a *quantum meruit*.

While I have said it is not necessary in my view to determine the large legal question which has been argued by Mr. Hodgins, and argued very ably, still I have a very strong opinion upon the point, and if it were necessary for the determination of the case I would not hesitate to determine it upon that opinion.

1906

IN-

DEPENDENT  
CORDAGE  
Co.  
AND  
THE KING.



Meredith, C.J.

1906

IN-

DEPENDENT  
CORDAGE  
Co.AND  
THE KING.

I entirely disagree with the view that the assent by the House of Assembly to the contract, or the resolution of the House ratifying the contract made the contract or gave to the contract the force of a statute of the Province. It may well be, although one has to search in ancient times to find them, that there are instances of Acts of Parliament where the assent of the Crown has preceded the action of the other constituent bodies in the Legislature, instead of their following it as is the usual practice, but it would be straining the line of decisions upon which Mr. Hodgins bases his argument to apply them to what was done in this case. There was no idea of passing an Act of Parliament. The forms of procedure which are adopted in the passing of an Act were entirely omitted. A bill is introduced and read three times. It must pass through all these stages before it finally becomes the ultimate action of the Assembly. Nothing of that kind was done here. The contract was laid upon the table of the House. Notice of motion was given that upon a certain day the Minister in charge would move a resolution approving of and ratifying the contract. I do not think this had any of the characteristics of an Act of Parliament, and, as I have said, there was no intention on the part of anybody that it should. It was simply an assent, not constitutionally necessary, I think—an assent by the Assembly to a contract which the Executive Government had entered into and had stipulated should not become operative until that assent had been obtained.

Nor am I able to agree that even if the resolution had the effect for which Mr. Hodgins contends that it would not have been open to the Executive Government to have modified the terms of the agreement. I think it is impossible to come to the conclusion, that with such an agreement, covering a period of years in which the working out of it might shew that modifications in minor details were necessary, or where, as did happen, the machinery might be destroyed by fire and new conditions arise, the whole of the machinery of the Central Prison, as far as this industry was concerned, was to be paralyzed until the Legislature could be called upon to deal with the matter.

I think it was quite open to the Government to make the modifications in the contract which were made.

It is also to be observed that although, as Mr. Hodgins very properly pointed out, it was an option that the contractors had, to supply the additional machinery, they had to supply it at their own expense under the terms of the contract. But what if the time arrived when the contractors had said, "Although we have this option we are not going to exercise it, but it is in our interest and in your interest that this additional machinery be installed"—Were matters to stand still? Was there to be no power in the Government to enter into an agreement by which that could be done? I think if the argument that has been adduced on the part of the Crown in this case were given effect to, the Government would be shorn of many powers that in my judgment it possesses, and be very much hampered in carrying on the business of the Province.

I repeat, I have nothing to do with the question of policy, and have not to consider whether the agreement was a judicious one to have been entered into. These are matters for the Legislature and the people, not for the Court.

G. A. B.

Meredith, C.J.

1906

IN-  
DEPENDENT  
CORDAGE  
Co.  
AND  
THE KING.

## [DIVISIONAL COURT.]

D. C.

1906

April 19.

Dec. 15.

## BURTCH V. THE CANADIAN PACIFIC RAILWAY.

*Railways—Crossing in Town—Hand-car—Warning—Finding of Jury—Railway Committee Jurisdiction—Infant Plaintiff—Negligence—Contributory Negligence—By-law Against Coasting.*

A child of ten years of age was coasting down an incline on a street in a town crossed by a railway, and was run down and injured by a hand-car proceeding along the railway.

At the trial, the jury found in answer to questions, that the defendants were negligent in not giving some warning in approaching the crossing; that the defendants could have avoided injuring the plaintiff by stopping the hand-car, and that it was their duty, apart from the provisions of the Railway Act, to have given warning:—

*Held*, that the jury, in finding that warning should have been given, were not assuming to lay down any general rule as to what care or precaution should be taken, but simply that under the circumstances some warning should have been given, and that the answer was unobjectionable and in no way infringed upon the jurisdiction of the Railway Commission.

*Held* also, that even if a hand-car is not a train, a warning is necessary apart from the Railway Act.

*Held* also, that although there was a municipal by-law prohibiting coasting, the plaintiff had not been notified as required by the by-law, and the onus was on the defendants to prove criminal capacity at common law and under the Code of an infant under fourteen, and the defendants were not entitled to invoke such by-law for another purpose.

*Held* lastly, that although a defendant is not liable if the injury is caused entirely by an infant's own negligence, the capacity of the infant to be guilty of contributory negligence is a question for the jury, and that as the plaintiff was not a trespasser and was where he had a right to be, and had not been notified under the provisions of the by-law, or his capacity for crime shown, the whole case was properly submitted to the jury.

THIS was an appeal by the defendants from the judgment at the trial in an action for damages for injuries caused by a passing hand-car to an infant, who was coasting down an incline and across the defendants' railway running through the town of Orangeville.

The action was tried at Orangeville on the 18th of April, 1906, before ANGLIN, J., with a jury.

*J. B. Lucas*, for the plaintiff.

*W. J. L. McKay*, for the defendants.

The following facts are taken from the judgment of Clute, J., in the Divisional Court:—

The defendants' railway passes through the town of Orangeville, crossing John street in the said town. The infant plaintiff, on the 29th September, 1905, while on an errand upon said street,

and while passing the point where the said railway crosses the same, was run down by a hand-car, then used by the employees of the defendant company, and was seriously injured, owing, as it is alleged, to the negligence of the defendants.

The evidence shewed that the infant plaintiff had stopped on the road to play with other boys after having delivered certain parcels with which he was sent, and that he was coasting down the incline on John street in his little express waggon when the accident occurred. He was sitting in front steering the waggon, and another boy was behind facing the opposite direction.

Questions were submitted to the jury and answered as follows:—

1. Q. Were the defendants guilty of any negligence which caused the injuries sustained by the plaintiff? A. Yes.

2. Q. If so, in what did such negligence consist? A. The negligence consisted in having a close board fence along the west side of street running south from the railway to south of railway limit, also the bank running west along the south side of track, also shrubbery and weeds growing along the wire fence. We consider it negligent in not giving some warning in approaching a crossing such as John street.

3. Q. Did the plaintiff omit to take any reasonable care, which he should have taken, and which, if taken would have prevented the occurrence in question? A. No.

4. Q. If so, what such care did he omit to take?

5. Q. Could the defendants, after the plaintiff's danger became or should have been apparent, have avoided injuring the plaintiff? A. Yes, after it should have been apparent.

6. Q. If so, what could they have done which they did not do? A. We think they could have stopped the car.

7. Q. At what sum do you assess plaintiff's damages? A. \$1,000.

Supplemental question. Was it the duty of the defendants, apart from the requirement of sec. 228 of the Railway Act, to have warned the plaintiff of the approach of the hand-car which struck his cart? A. Yes.

April 19. ANGLIN, J.:—After considering the judgment of the Supreme Court in *The Lake Erie and Detroit River R.W. Co. v. Barclay* (1900), 30 S.C.R. 360, I have concluded that the motion for

D. C.

1906

BURTCH  
v.

CANADIAN  
PACIFIC  
R.W.



D.C.  
1906

BURTCHE  
v.  
CANADIAN  
PACIFIC  
R.W.  
Anglin, J.

non-suit made on behalf of the defendants at the close of the plaintiff's case cannot succeed.

There was evidence here from which it might properly be inferred by the jury, that the crossing upon which the plaintiff was injured was of a particularly dangerous character.

He was injured, not by an engine and train, to which the requirements of blowing the whistle and sounding the bell have application. No provision appears to be made in the Railway Act prescribing any means of warning or of safe-guarding the lives of persons using highway crossings where the railway is operating, not a regular train of cars, but a hand-car or lorry, such as was used in this case, unless sec. 228 of the Act applies to such a car.

If sec. 228 does apply, there was evidence of a failure to comply with its requirements. If that section does not apply, then the question is at large, as to what precautions a railway company should be required to take to safe-guard the lives of persons using the highway under circumstances such as we have here.

A hand-car coming down grade, even at a comparatively high rate of speed, makes very little noise as compared with the noise which an engine and train would make, yet the engine and train is required to give warning of its approach by sounding the bell and whistle. In circumstances, therefore, such as we have here—circumstances of peculiar danger, having regard to the nature of the crossing, and to the use made of the hand-car—I think it must properly be left to the jury, if sec. 228 does not apply, to determine what precautions, if any, the railway company should be required to take for the protection of the lives and limbs of persons crossing, or about to cross, the highway. As that question must go to the jury, and as in this case it has been submitted to the jury, and the jury have found an obligation to give some warning, which was not given, it follows, that there must be judgment upon the findings in favour of the plaintiff for the damages awarded, the sum of one thousand dollars, and I shall give judgment accordingly.

From this judgment the defendants appealed to a Divisional Court, and the appeal was argued on the 26th and 27th of September, 1906, before FALCONBRIDGE, C.J.K.B., BRITTON and CLUTE, JJ.

*H. S. Osler*, K.C., for the appeal. The child had no right to be where he was and had no right to play on the streets or to coast down the incline; in fact, there was a municipal by-law enacted against such coasting. He was really a trespasser: *Regina v. Justin* (1893), 24 O.R. 327; *Patterson v. Fanning* (1901), 2 O.L.R. 462. *Ricketts v. The Corporation of the Village of Markdale* (1900), 31 O.R. 610, is a somewhat similar case, but there, there was an allurements, and that decision was doubted in *Farrell v. Grand Trunk R.W. Co.* (1903), 2 Can. Ry. Cas. 249. The hand-car was not a train; nothing was being drawn. No warning was prescribed. It was not open to the jury to find that the railway company should take any special precaution in any special case. In doing so, they were usurping the functions of the Railway Commission: *The Grand Trunk Railway Company of Canada v. McKay* (1903), 34 S.C.R. 81, per Sedgewick, J., at pp. 88 and 89; per Davies, J., at p. 97; *The Grand Trunk Railway Company of Canada v. Hainer* (1905), 36 S.C.R. 180; *Gorris v. Scott* (1874), L.R. 9 Ex. 125.

*W. J. L. McKay*, contra. The plaintiff has satisfied the onus of proof in every respect. The jury have merely found negligence on the part of the defendants, which they had the right to do. The defendants, without any statutory obligation, were guilty of negligence in not giving warning as they were running across a travelled street in a town. In order to escape liability, the defendants must shew that the accident was wholly attributable to the infant's negligence, and they have not done this. I refer to Smith on Negligence, Bl. ed., pp. 14 and 160; *Champaigne v. The Grand Trunk R.W. Co.* (1905), 9 O.L.R. 589; *The Grand Trunk R.W. Co. v. McKay* (1904), 3 Can. Ry. Cas. 52; *Thompson v. The Great Western R.W. Co.* (1874), 24 C.P. 429; *Smith v. The London and South Western R.W. Co.* (1870), L.R. 6 C.P. 14; *Bilbee v. The London, Brighton and South Coast R.W. Co.* (1865), 34 L.J.C.P. 182. The jury may assume facts from common knowledge, and the view of a jury is an original source of evidence: *Thompson v. The Great Western R.W. Co.* (1874), 24 C.P. 429; Wigmore on Evidence, Can. ed., pars. 1168 and 2570, and notes; *Beckett v. The Grand Trunk R.W. Co.* (1886), 13 A.R. 174, per Osler, J.A., at p. 206. Even though the plaintiff was committing a breach of the by-law at the time of the accident, he can recover: *Steele v. Burkhardt*

D. C.

1906

BURTCH  
v.  
CANADIAN  
PACIFIC  
R.W.

D. C.  
1906  
BURTCH  
v.  
CANADIAN  
PACIFIC  
R.W.

(1870), 104 Mass. 59; and capacity of an infant to commit crime must be shewn: Russell on Crimes, 6th ed., p. 113 *et seq.* I refer also to *Hollinger v. Canadian Pacific R. W. Co.* (1893), 20 A. R. 244; *Cox v. The Great Western R. W. Co.* (1882), L. R. 9 Q. B. D. 106; *The Lake Erie and Detroit River R. W. Co. v. Barclay* (1900), 30 S.C.R. 360; *Lynch v. Nurdin* (1841), 1 Q.B. 29.

*Osler*, in reply, cited *Makins v. Piggott* (1898), 29 S.C.R. 188; *McShane v. The Toronto, Hamilton and Bruce R.W. Co.* (1899), 31 O.R. 185; *The New Brunswick R.W. Co. v. Vanwart* (1889), 17 S.C.R. 35.

December 15. BRITTON, J.:—The facts are fully set out in the judgment of my brother Clute, which I have had the privilege of perusing.

The damages are large, but hardly so excessive as to warrant a new trial on that ground.

The jury acquitted the plaintiff of any contributory negligence, and answered the first, second and supplemental questions by finding the defendants guilty of negligence, which caused the injury sustained by the plaintiff. The answer, "We consider it negligent in not giving some warning in approaching a crossing such as John street," must, when considered in the light of the Judge's charge, be taken as a finding that no warning was in fact given by those on the hand-car of the approach of that car to the crossing.

Then the jury expressly found that it was the duty of the defendants, apart from the requirement of sec. 228 of the Dominion Railway Act of 1903, to have warned the plaintiff—that is to say, to have warned persons upon or near the crossing of the approach of the hand-car.

There was evidence which would permit such a finding. I do not see any difference in principle, upon the point involving negligence and liability, between this case and that of a servant upon his master's business driving along an ordinary highway and colliding with a vehicle or person upon a cross-road.

The hand-car was lawfully upon defendants' railway. The plaintiff was lawfully upon John street. The plaintiff was run down by the hand-car and the jury say the plaintiff was not to blame, but the defendants were to blame, and that the blame or negligence was in approaching such a crossing as this was in a



hand-car as driven, without giving such warning as would enable a person on the highway and near to the track, exercising ordinary care, to avoid the danger of being run down.

What warning should be given must depend upon the facts and circumstances in each case, and if from any cause it would be difficult for a person at or near the crossing—he not being to blame for, or creating the difficulty—to see or hear an approaching hand-car, there would be necessity for care on the part of the persons in charge of the car.

I am of opinion that there was no evidence to go to the jury upon the question of negligence of the defendants as to the fences, or as to the excessive speed of the hand-car.

I am further of the opinion that there was not evidence upon which the jury could be asked to find “that the defendants, after the plaintiff’s danger should have been apparent, could have avoided injuring the plaintiff,” and even if the defendants could have avoided the accident after the danger “should have become apparent,” that does not necessarily amount to a finding of negligence which was the cause of the accident, or to a fixing of liability.

In *The Lake Erie and Detroit River R.W. Co. v. Barclay*, 30 S.C.R. 360, it was held that “it was properly left to the jury to determine whether or not, in this particular case where . . . , there being no engine connected with the train colliding with the carriage, and none of the usual signals, such as the blowing of whistles or the ringing of bells, to give warning to passers-by, it was not necessary, at that particular time and under those particular circumstances, to take greater precautions than they really did take, and to be much more careful than in ordinary cases where these conditions did not exist:” *per* Sedgewick, J., at p. 364.

In the present case, the physical condition of land, fences, weeds, shrubs, etc., near to the crossing where the accident happened, had to be taken into consideration in determining what those operating the hand-car should do in approaching such a crossing.

I think the question involving negligence on the part of the defendants in not giving some warning of the approach of the hand-car was a proper one, and I cannot say that the jury should not have found as they did.

The appeal should be dismissed with costs.

D. C.

1906

BURTCH  
v.  
CANADIAN  
PACIFIC  
R.W.

Britton, J.



D. C.

1906

BURTH  
v.  
CANADIAN  
PACIFIC  
R.W.

Clute, J.

CLUTE, J. (after setting out the facts and questions and answers as above):—It was submitted on behalf of the defendants that there was no evidence on the part of the plaintiff rendering them liable for the accident which happened; and in support of this contention it was strenuously urged that, to hold the railway bound to give notice of the passing of a hand-car under circumstances such as the present, would be for the jury to assume the function of the Railway Commission; that a railway using a hand-car in the ordinary manner and having no obligation imposed upon them by the statute with reference to signals or notice, were not bound to give notice, and for the jury to find that their neglect in so doing was negligence was beyond their competency under the circumstances in this case.

A somewhat similar point was involved in *The Lake Erie and Detroit River R.W. Co. v. Barclay*, 30 S.C.R. 360. In that case the jury found that the railway company was guilty of negligence, and that a man should have been on the crossing when making the switch, to warn the public. This finding was supported in the Court of Appeal and affirmed in the Supreme Court, where it was held that the case did not raise the question of the jury's right to determine whether or not the railway company can be compelled to place a watchman upon a level highway crossing to warn persons about to cross the line. So here, the jury do not assume to lay down any general rule, as to what care or precaution should be taken. They simply find, that, having regard to the condition of the approach to this crossing on the defendants' railway and the circumstances of this case, some warning should have been given.

The answer, I think, was unobjectionable. It simply disposed of a case having regard to certain special circumstances. I think there was evidence to support the finding, and under the authority of the above case, that the findings of the jury in no way infringed upon the jurisdiction of the Railway Commission.

*The Grand Trunk R.W. Co. of Canada v. McKay*, 34 S.C.R. 81, was relied upon by counsel in support of his contention, but that case, in my judgment, does not conflict with the case just referred to. The *McKay* case simply decided that, in passing through a thickly peopled portion of a town or village, a railway train is not limited to a maximum speed of six miles an hour, so long as the railway fences on both sides of the track are maintained and turned

into cattle guards at highway crossings. Sedgewick, J., points out that "no person has a right to prevent any other person from driving his horse or from himself going up to within a foot of a passing train; and certainly no one has the right to prevent any one going upon that part of the highway which is opposite to the unoccupied portion of the railway grounds. If the railway company without express statutory authority were to erect gates opposite to its side fences, and lower those gates at any time, any person prevented from driving or walking towards the line of rails by such gates would be interfered with in his legal common rights. It must be apparent, then, that there must be some authority given to a railway company before it can assume to erect gates upon a highway. This authority is to be found in the Railway Act," etc.

But it is said, that the judgment of Davies, J., at p. 97, shews that Parliament by sec. 187 of the Railway Act vested in the Railway Committee, now the Railway Commission, the exclusive power and duty to determine the character and extent of the protection which should be given to the public at places where the railway track crosses the highway at rail level. That section reads as follows: "And the Railway Committee, if it appears to it expedient or necessary for the public safety, may, from time to time, with the sanction of the Governor-in-Council, authorize or require the company to which such railway belongs, within such time as the said committee directs, to protect such street or highway by a watchman or by a watchman and gates or other protection." Having regard to the purview of the section and what is said by Davies, J., I think it clear that it has no application to the present case.

This is not the case of affording protection as indicated in that section, but whether or not, having regard to the peculiar circumstances of the case, notice should have been given by the passing hand-car of its approach. Having regard to the interpretation clauses of the Railway Act of 1903 (D.), ch. 58, sec. 2, sub-sec. (*a.a.*), and sec. 228, the argument at first glance seems to be complete that the hand-car is a "train" within the meaning of the Act, and that warning should be given under that section.

Mr. Osler sought to get rid of the logical effect of the interpretation clauses of this section as imposing such duty, by urging that

D. C.  
1906  
BURTCH  
v.  
CANADIAN  
PACIFIC  
R.W.  
Clute, J.

D.C.  
1906  
BURTON  
v.  
CANADIAN  
PACIFIC  
R.W.  
Clute, J.

sec. 228 so manifestly had reference to an ordinary train, that it was manifest the context required a more limited meaning to the word "train" than would be otherwise indicated by the interpretation clauses. I am of opinion that this is so, and that the above clauses of the Act do not help the plaintiff. There was, however, evidence of negligence in not giving warning, which, in my judgment, was proper to go to the jury.

The further question remains, as to whether the infant plaintiff has not precluded himself from recovering in this action by his own conduct.

The question of contributory negligence is for the jury. The defendants must, therefore, go further and shew that there was no evidence on the part of the plaintiff to submit to the jury. In other words, that his conduct by his own admission is such as to shew that he was the cause of his own injury. He was properly upon the street. The fact that he was playing on the street would not necessarily prevent his recovering, if he were injured by the defendants' negligence: *Ricketts v. The Corporation of the Village of Markdale*, 31 O.R. 180, 610.

It is said in *Farrell v. Grand Trunk R.W. Co.*, 2 Can. Ry. Cas. 250, that the *Ricketts* case was cited and doubted by some of the members of the Court; but it has not, so far as I know, been overruled. The Chancellor, in the *Ricketts* case, p. 615, after reviewing the English authorities, and pointing out that the English highway is the outcome of dedication by private proprietors, who still remain owners of the soil, subject to the right to easement, with the mere right to pass and re-pass, reached the conclusion that children may play on the highway when there is no prohibitory legal law and where their presence is not prejudicial to the ordinary use of the street for passage and traffic, quoting *McGarry v. Loomis* (1875), 63 N.Y. Rep. 108, where Church, C.J., said: "That it is not unlawful, wrongful, or negligent for children on the highway to play, is a proposition which is too plain for comment."

Reference was made to the by-law No. 366, entitled a by-law to prevent children riding behind waggons, etc., etc. The by-law contains a number of provisions, one of which is that "no person shall coast on a hand-sleigh or sleigh, or toboggan or other device, on any street or sidewalk, within the municipality of Orangeville. That it shall be the duty of the chief constable to notify any child



or person doing so of the consequences of violating this by-law, and after a second offence, to summon and to bring such child or person before the magistrate."

Murray defines "coasting" to mean "the winter's sport of sliding on a sled down hill," and hence the action of shooting down hill on a bicycle or tricycle. Here, the by-law uses the words "other device," and having regard to the popular meaning of "coasting" and the expression of the by-law, I am of opinion that the by-law is sufficiently broad to apply to the present case.

There was, however, no evidence that the plaintiff had been warned, and it does not appear to be an offence punishable under the by-law until he is warned, although it is something which the town desired to prohibit in the manner indicated. But I do not think the defendants are entitled to avail themselves of the by-law as an answer to the plaintiff's claim. It was probably admissible as evidence for what it was worth, as shewing the action of the municipality in regard to the rights of children playing upon the street. But it was manifestly passed to prevent sport of that kind from interfering with the ordinary use of the street, and I do not think a by-law passed for that purpose can be invoked by the railway company for another purpose. Reference may be had to *Gorris v. Scott*, L.R. 9 Ex. 125, as bearing upon this question. There, it was held that where the statute creates a duty with the object of preventing a mischief of a particular kind, a person who, by reason of another neglect of the statutory duty, suffers a loss of a different kind, is not entitled to maintain an action in respect of such loss. Though the statute relied upon and the facts in that case are entirely different from the present, the reasoning applicable is, I think, analogous. There the defendant was a ship-owner and undertook to carry the plaintiff's sheep from a foreign port to England. On the voyage, some of the sheep were washed overboard by reason of the defendants' neglect to take a precaution enjoined by an order of the Privy Council, which was made under the authority of the Contagious Diseases (Animals) Act, 1869, sec. 75. It was held, that the object of the statute and the order being to prevent the spread of contagious disease among animals and not to protect them against perils of the sea, the plaintiffs could not recover. Kelly, C. B., at p. 129, says: "And if we could see that it was the object, or among the objects of this Act, that the owners

D. C.

1906

BUTCH

v.

CANADIAN

PACIFIC

R.W.

Clute, J.



D.C.

1906

BURTCH

v.

CANADIAN

PACIFIC

R.W.

Clute, J.

of sheep and cattle coming from a foreign port should be protected by the means described against the danger of their property being washed overboard, or lost by the perils of the sea, the present action would be within the principle.

But, looking at the Act, it is perfectly clear that its provisions were all enacted with a totally different view; there was no purpose, direct or indirect, to protect against such damage."

Pigott, B., at p. 130, says: "Admit there has been a breach of duty; admit there has been a consequent injury, still the Legislature was not legislating to protect against such an injury, but for an altogether different purpose; its object was not to regulate the duty of the carrier for all purposes, but only for one particular purpose."

Also the observations of Pollock, B., at pp. 130-1, and the cases there referred to.

The plaintiff's infancy has, I think, a direct bearing upon the question of the defendants' liability.

"During the interval between fourteen years and seven, an infant shall be *primâ facie* deemed to be *doli incapax*, and be presumed to be unacquainted with guilt; yet this presumption will diminish with the advance of the offender's years, and will depend upon the peculiar facts and circumstances of his case": Russell on Crimes, 6th ed., vol. 1, p. 114.

An infant cannot, any more than an adult, recover damages for the injury which has been caused by his own negligence: Simpson on Infants, 2nd ed. p. 110. But it is said that though the defendant is not liable if the injury be caused entirely by the infant's negligence, he is liable if the infant has only been guilty of contributory negligence: p. 111.

In *Gardner v. Grace* (1858), 1 F. & F. 359, it appeared that the defendant was driving, when the plaintiff, aged three years and a quarter, ran out into the road, was knocked down and run over. The evidence was contradictory as to the speed at which the defendant was driving. Channel, B., said: "The doctrine of *contributory* negligence does not apply to an infant of tender age. To disentitle the plaintiff to recover, it must be shewn that the injury was occasioned entirely by his own negligence."

*Makins v. Piggott* (1898), 29 S.C.R. 188, and *McShane v. Toronto, Hamilton and Bruce Ry.*, 31 O.R. 185, may be referred to

as shewing the distinction where the infant is a wrong-doer, a trespasser upon the defendants' property, and where he is actuated by childish curiosity, which results in his injury by reason of the defendants' negligence in leaving a dangerous article (an explosive cap) where it might fall into the hands of persons unaware of its character. In the *Makins* case it was said, at p. 191, by King, J.: "If he was negligent and thereby contributed to the result, still, unless such negligence is necessarily to be imputed upon the evidence, it would be for the jury to pass upon it."

In the present case it has not, in my judgment, been made to appear that it was necessarily by the plaintiff's own negligence that the injury was caused. Without deciding whether an infant of tender years can be guilty of contributory negligence, I think upon the authorities, that in the present case it was for the jury to say, having regard to the plaintiff's age, to the location, and the circumstances of the case, whether or not, the plaintiff was guilty of contributory negligence. The plaintiff was not a trespasser. He was there as of right. So far as the defendants were concerned he had a right to ride his waggon if he pleased in descending the grade. At all events, he had not been warned not to do so, even if the by-law applied. Under the facts in this case, I think the learned trial Judge was right in submitting the whole case to the jury, and the jury having found, I see no reason to disturb the verdict. The damages are not, I think, unreasonable, having regard to the nature and extent of the injuries. Appeal dismissed with costs.

FALCONBRIDGE, C.J., concurred in the judgment of CLUTE, J.

G. A. B.

D. C.

1906

BURTCH  
v.  
CANADIAN  
PACIFIC  
R.W.

Clute, J.

## [DIVISIONAL COURT.]

D. C.

1906

Dec. 14.

1907

Feb. 28.

## INTERNATIONAL TEXT-BOOK COMPANY V. BROWN.

*Constitutional Law—Powers of Provincial Legislature—B.N.A. Act, sec. 92, sub-sec. 2—Act Respecting Licensing of Extra Provincial Corporations—Intra vires—Company Carrying on Business in Ontario.*

The plaintiffs, a company incorporated in the State of Pennsylvania, to carry on a printing, publishing, and bookbinding business, with the head office in that State, had, as one of its departments, under a special charter therefor, procured in the same State, and with the same head office, what was called "The International Correspondence School," the object being to give by correspondence through the mails, instruction to applicants for enrollment as students, the company having representatives throughout the Province for procuring such applications, all of which were submitted to the head office for approval, and, if accepted, the certificates of enrollment were sent direct to the students with the lesson and instruction papers, followed at stated intervals by further instruction and lesson papers, pamphlets, etc., and when the contract so provided, lesson books in bound form, drawing materials, phonographic and other outfits, were loaned to the students. The company had an office in Toronto, over which their name was affixed, with a superintendent, cashier, and number of stenographers, to which all monies collected in this Province were forwarded, and from there remitted to the head office; while the bound lesson books, etc., for convenience of passage through the customs were sent from the head office to Toronto, and after the payment of the duties were forwarded by the postmaster to the students. Salaries were paid by the cashier at Toronto out of the moneys in his hands:—

*Held*, that the Act 63 Vict. ch. 24 (O.) for licensing of extra provincial corporations, was *intra vires* the Provincial Legislature as coming within sec. 92, sub-sec. 2 of the B.N.A. Act, being a mode of direct taxation within the Province, or as relating to the issuing of licenses in order to the raising of a revenue; and that the plaintiffs were carrying on business in Ontario within the meaning of the Act, so as to necessitate their taking out a license, and their omission to do so precluded them from maintaining an action for the recovery of moneys claimed to be due from one of the enrolled students.

This was a special case stated for the opinion of the Court as follows:—

1. The plaintiff is a company incorporated under the laws of the State of Pennsylvania, one of the United States of America, and has its head office in the city of Scranton in said State.

2. The defendant is a merchant, who formerly resided in the city of London, in the Province of Ontario, but who now resides in the city of Toronto in said Province.

3. The defendant owes the plaintiff the sum of \$25.40 under a written agreement, bearing date the 9th day of January, 1904, a copy whereof is appended hereto.

4. The defendant admits there is still due under said contract the sum aforesaid, but claims that because of the admitted failure



of the plaintiff to take out a license under the provisions of the Act respecting the Licensing of Extra Provincial Corporations (63 Vict. ch. 24) the plaintiff is incapable of maintaining any action against him.

5. The plaintiff avers that it is not carrying on the business within Ontario under the provisions of the said Act; and claims that what it is doing is commerce; and that being a corporation, in and of a country foreign to Canada, the Legislature of Ontario has not the jurisdiction of the Parliament of the Dominion of Canada. And the plaintiff further submits that the said Act is unconstitutional and void, as not being within the competence of a Provincial Legislature.

6. The purposes for which the plaintiff was incorporated, as stated in its charter, are as follows:—

“Said corporation is formed to originate, write, compile, illustrate, edit, publish and sell instruction papers, text-books, drawing plates, periodicals, magazines, pamphlets, articles and letters for the dissemination of literary, technical, educational and other information; to conduct a printing, engraving, lithographing, stereotyping, electrotyping, line work, half-tone work, embossing, printing in black and colours, photographing, phototyping, photo-graving, picture printing, and a book-binding business; and generally to transact a printing, book-binding and publishing business by the various methods now in use, or which may be hereafter introduced or invented.”

7. The principal purpose for its incorporation was to give instruction by correspondence through the mail, and for over ten years it used the name International Correspondence Schools as a trade name. In 1901 it made application to the Governor of the Commonwealth of Pennsylvania as provided by the laws of said Commonwealth, and in said year was granted a charter for a company under the name of the International Correspondence Schools. The stock of this company is owned by the plaintiff, who manages and directs the company as one of the departments of its business, employs, discharges and pays the teachers their wages, handles all the mail through its mailing department, and is alone responsible for the work done by the teachers, the same as it is responsible for the acts of its employees in any other department of its business.

D. C.

1907

INTER-  
NATIONAL  
TEXT-BOOK

Co.

v.

BROWN.



D. C.

1907

INTER-  
NATIONAL  
TEXT-BOOK

Co.

v.

BROWN.

8. The company appoints representatives (formerly named solicitor-collectors) in the Province of Ontario and elsewhere throughout the English speaking world who obtain applications from those proposing to enroll themselves as students. These applications are sent forward to Scranton to be either accepted or rejected by the company.

9. When an application is accepted at Scranton the company mails from Scranton addressed to the student a certificate of enrollment similar to that appended together with lesson papers and explicit instructions advising him how to commence and pursue his studies. These are followed in regular order by other instruction papers or pamphlets, and the company also loans, where the contract provides for it, a set of books in bound form, drawing instruments, phonograph outfits and other outfits which may be required in the different courses of instruction. The student sends in his lesson papers to Scranton, where they are corrected by the plaintiff's instructors and returned through the mail.

10. Payments for instruction are, as a rule, made to or collected by the company's representatives in the locality where the student lives. These payments, if made in the Province of Ontario, are then remitted by these local representatives to Toronto, whence they are sent forward to the company at Scranton.

11. The company rents offices in Toronto for the use of its representatives there, and paints or affixes the name of the company over and upon such offices. Elsewhere throughout Ontario the rentals of the offices occupied by the company's representative are paid by the representatives themselves and not by the company. The company furnishes certain of its representatives with stationery for their correspondence, etc., samples of which are appended hereto.

12. The company employs in Toronto a superintendent, a cashier and a staff of stenographers, and in addition to the representatives above named appoints throughout Ontario some eight or nine assistant superintendents, who control and aid the work of the company's representatives in the districts assigned to them.

13. The employees in Toronto other than the superintendent and the representatives are paid by salary, the superintendent, assistant superintendents and all representatives are paid partly by salary and partly by commission. These payments as a rule

are made by the cashier in Toronto out of the company's funds in his hands.

14. The company from time to time send to Toronto shipments of bound text-books, drawing outfits, phonographs, phonograph records and of stationery and these books, drawing outfits, phonograph records and stationery are supplied throughout Ontario and other parts of Canada to such students, as the head office of the company at Scranton may direct. The shipments to Ontario are thus made for convenience in getting them through the custom house: students' lessons on phonograph records in language courses are sent in special mail bags to the post office in Toronto, where the custom duties are paid and the same are forwarded by the postmaster in Toronto to the students in Canada as they are addressed.

15. In the present case the defendant signed the proposal in London, and paid on account thereof the sum of \$6.00. After the proposal was accepted by the company in Scranton the defendant received through the mail from Scranton the usual preliminary course of instruction, but the defendant has refused and still refuses to pay the balance due under the said contract.

16. It is agreed that if either of the questions be answered in the negative judgment shall go for the plaintiff, while if both be answered in the affirmative judgment shall be for the defendant.

The questions for the opinion of the Court are:—

1. Whether the above mentioned Act is *intra vires* the Legislature of the Province of Ontario.

2. Whether the plaintiff company is carrying on business in Ontario so as to bring it within the provisions of the said Act.

On October 3rd, 1906, the case was argued before FALCONBRIDGE, C.J.K.B.

*Hume Cronyn*, for the plaintiff.

*H. S. Blackburn*, for the defendant.

*J. R. Cartwright*, K.C., for the Attorney-General of Ontario.

No one appeared for the Minister of Justice.

Mr. Cronyn asked that Mr. Harrington, a counsel practising in the United States, should be allowed to address the Court, but this was refused, the practice of the Court not permitting it.

D.C.

1907

INTER-  
NATIONAL  
TEXT-BOOK  
Co.  
v.  
BROWN.

D. C.

1907

INTER-  
NATIONAL  
TEXT-BOOK

Co.

v.

BROWN.

Falconbridge,  
C.J.

December 14. FALCONBRIDGE, C.J.:—This is a special case stated for the opinion of the Court. The facts are fully set forth in the case, and the two questions submitted are: (1) Whether the Act respecting the Licensing of Extra Provincial Corporations, 63 Vict. ch. 24 (O.), is *intra vires* the Législature of the Province of Ontario. (2) Whether the plaintiff company is carrying on business in Ontario so as to bring it within the provisions of the said Act.

1. The first question seems upon its face to be a somewhat large one; but I think it may be shortly considered to be within the powers of the Legislature of Ontario under sec. 92, sub-secs. 2 and 9, of the British North America Act; as being a mode of direct taxation within the Province, or as relating to the issuing of a license in order to the raising of a revenue.

The point has been dealt with in *Bank of Toronto v. Lambe* (1887), 12 App. Cas. 576; and also in two cases in Nova Scotia, viz., *City of Halifax v. Western Assurance Co.* (1885), 18 N.S.L.R. 387; and in *City of Halifax v. Jones* (1896), 28 N.S.L.R. 452.

It is to be observed in connection with this branch of the case that not only is a fee for licenses exacted, but it is required that there shall be paid to the Provincial Secretary for the public use of Ontario, a yearly fee upon the transmission to him of the annual statement required by the Act.

No question whatever arises under clause 25 of sec. 91 of the B. N. A. Act. There is no distinction made in the Act between alien corporations and those of the mother country or of other portions of the Empire.

I may say that I should hesitate, notwithstanding some dicta cited in Mr. Harrington's very able brief, to class the purposes and operations of the plaintiff company as "commerce." The selling or lending of books and other material to students is only ancillary to the principal purpose of the company, which is to give instruction by correspondence through the mail.

The answer, therefore, to the first question will be, yes.

2. The second question is whether the plaintiff company is carrying on business in Ontario so as to bring it within the provisions of the said Act.

This point is covered by the judgment of the King's Bench Division in *Bessemer Gas Engine Co. v. Mills* (1904), 8 O.L.R. 647.

The application of the English income tax cases, such as *Granger v. Gough*, [1896] A.C. 325, is taken away by sec. 14 of the 63 Vict., which, so to speak, interprets itself by declaring that a penalty shall be incurred if an unlicensed corporation shall carry on in Ontario any part of its business; and that the company shall not be capable of undertaking an action in respect of any contract made in whole or in part in Ontario.

The answer to the second question also will be in the affirmative.

The judgment, therefore, will be for the defendant.

There is nothing said in the case about costs, and I suppose the parties have their own arrangement. If I have any power of disposition over costs I direct them to be paid by the plaintiff to the defendant; and also to the Attorney-General if the Crown condescend to accept costs.

From this judgment the plaintiff appealed to a Divisional Court.

On February 28th, 1907, the appeal was heard before MULOCK, C.J.Ex.D., ANGLIN and MAGEE, JJ.

*R. W. Eyre*, for the appellant.

*H. S. Blackburn*, for the respondents the International Text-Book Company.

*J. R. Cartwright*, K.C., and *T. Mulvey*, K.C., for the Attorney-General for Ontario.

At the conclusion of the argument the Court dismissed the appeal with costs.

G. F. H.

D. C.

1906

INTER-  
NATIONAL  
TEXT-BOOK

Co.

v.

BROWN.

Falconbridge,  
C.J.



## [DIVISIONAL COURT.]

D. C.

1907

Feb. 28.

IN RE PETRAKOS.

*Mines and Minerals—Appeal from Mining Commissioner—Notice of—Parties Adversely Interested—Mines Act, 1906, 6 Edw. VII., ch. 11, sec. 75 (O.).*

Parties who, alleging the discovery of valuable ore, have staked out a claim and filed an application, are "parties adversely interested" as against one who has previously staked out a similar claim on the property and filed his application, within the meaning of sec. 75 of the Mines Act, 1906, respecting appeals to the Mining Commissioner from a decision of a Mining Recorder; and if notice of such appeal has not been duly filed and served upon them the appeal must be dismissed.

THIS was an appeal from the decision of the Mining Commissioner, under the following circumstances: The appellant Petrakos alleging that he had on May 28th, 1906, discovered valuable mineral upon certain property, staked on June 9th, and filed his application on June 11th. Coleman alleging a discovery on June 13th 1906, staked on June 16th, and filed his application on June 20th.

The Mining Recorder decided against Petrakos's application, and he, desiring to appeal to the Mining Commissioner, filed a notice of appeal under secs. 74, 75 of the Mines Act, 1906, 6 Edw. VII., ch. 11 (O.), in the office of the Mining Recorder, but omitted to serve the Coleman Development Co. or F. M. Burdock (who claimed by way of assignment from Coleman).

The Mining Commissioner held that the appeal was not properly launched by reason of the failure to serve these persons; and Petrakos appealed to the Divisional Court under the provisions of sec. 30 of the Mines Act, 1906.

The appeal was argued on February 21st, 1907, before FALCONBRIDGE, C.J.K.B., and BRITTON and RIDDELL, JJ.

*J. M. Ferguson*, for the appellant, contended that the Coleman Development Co. and Burdock were subsequent discoverers, and not adverse parties, within sec. 75 of the Mines Act, 1906.

*W. M. Douglas*, K.C., for the Coleman Development Co., contended that his clients were adverse claimants, for they would get the property if the appellant failed to do so.

*J. F. H. McCarthy*, for F. M. Burdock.

D. C.

1907

IN RE  
PETRAKOS.

*Ferguson*, in reply, contended that the whole question was whether there had been a discovery of valuable ore or not by Petrakos, and the respondents had nothing to do with that.

February 28. BRITTON, J.:—I agree that this appeal must be dismissed.

Under sec. 75 of the Mines Act, 1906, 6 Edw. VII. ch. 11 (O.), "no appeal . . . from the decision of a Mining Recorder, to the Mining Commissioner, shall be allowed after the expiration of 15 days from the record of such decision by a Mining Recorder in the books of his office, unless *within that time* the time for appeal is extended by the Mining Commissioner, and thereafter not after the time limited by the Mining Commissioner therefor . . . Notice of appeal shall be given by filing a copy thereof in the office of the Mining Recorder and serving a copy thereof upon all parties adversely interested."

The Coleman Development Co. and F. M. Burdock were persons adversely interested within the meaning of that section.

They were not served with a copy of the notice of appeal within the time prescribed, so the decision of the Mining Commissioner disallowing the appeal to him was warranted by and was within the express wording of the section cited.

It appears that these persons interested adversely to the appellant were represented by counsel at the time appointed for hearing of the appeal, and took the objection that no notice had been served within the time prescribed.

It would, in my opinion, be a very reasonable thing to give to the Mining Commissioner, in cases where notice of appeal has been given by filing within the time mentioned, power to extend the time for service upon persons adversely interested. Cases may arise—possibly the one in hand is such a case—where the power, if it existed, might be wisely exercised, so that a decision of a Mining Recorder could be reviewed on its merits by the Mining Commissioner.

FALCONBRIDGE, C.J.K.B., concurred.

RIDDELL, J. [after setting out the facts as above]:—Before the Mining Commissioner, there seem to have been two points urged

D. C.

1907

IN RE  
PETRAKOS.

Riddell, J.

by Petrakos—(1) that there is no necessity of serving notice of appeal upon parties adversely interested within 15 days, and (2) that the Coleman Co. and Burdock are not “parties adversely interested.”

The first was not urged before us, as indeed it could not well be in view of the express words of sec. 75 and of the cases: *Christopher v. Croil* (1885), 16 Q.B.D. 66; *Shaw v. St. Thomas* (1899), 18 P.R. 454.

But it was argued that persons who have filed an application upon the same property as the applicant are not “parties adversely interested,” although it is admitted that if the application of the appellant should be allowed, that of the other parties filing applications must necessarily be disallowed, while if the application of the appellant be disallowed, the application of one or other of these will probably be allowed. I am unable to conceive of parties more vitally interested than persons in the position of filing applications only one of which can be allowed, and counsel before us was not able to give instances of any person to whom the description “party adversely interested,” would apply against whom the same arguments would not be effective as against the parties here.

I think the Commissioner was entirely right and that the appeal should be dismissed with costs.

A. H. F. L.

[BOYD, C.]

THOMSON &amp; AVERY v. MACDONNELL.

1906

Dec. 1.  
1906

*Life Insurance—Assignment of Policy—Informal Assignment—Security for Debt—R.S.O. 1897, ch. 203, sec. 151 (5).*

The holder of a policy of insurance on his own life intending to secure payment of a loan to him, signed a document addressed to the lenders in which he stated: "For collateral security I have placed aside and assigned to you a policy of insurance in the Standard Life Assurance Company for \$2,000":—*Held*, that the effect of the document was to give the equitable right and title to the policy to the lenders of the money as beneficiaries; and that other creditors could not claim as against them, for they could take no higher rights than the insured had at the time of his death.

In this action it appeared, as alleged in the statement of claim, that the plaintiffs, who were merchants, were in the habit of loaning money to Roderick Mackenzie, deceased, and on March 10th, 1903, gave him as accommodation a promissory note for \$2,000, which they subsequently had to pay; that on that date Mackenzie assigned to them as collateral security a life insurance policy in the Standard Life Assurance Company by assignment reading as follows:

Kingston, Ont., March 10th, 1903.  
Canada.

Thomson & Avery,

This is to certify that you have given me your promissory note Two Thousand dollars (2000) and for collateral security I have placed aside and assigned to you a policy of insurance in the Standard Life Ass'ce. Coy. for similar amount.

(Sgd.) R. Mackenzie.

Witnessed by

(Sgd.) B. R. Gale,  
(B. of M. Kingston). "

that at the time of this assignment Mackenzie held a number of policies in the same company, but the one in question was the only one for \$2,000, and also the only one assignable by himself; and that the assurance company had refused to pay over the amount, though demanded, until the plaintiffs' rights under the assignment were settled, but afterwards paid the money to the defendant, who was executor of Mackenzie's estate, and who had



1906  
THOMSON  
& AVERY  
v.  
MAC-  
DONNELL.

agreed to hold it until a judicial decision was obtained regarding the plaintiffs' rights under it.

The defendant by his defence expressed his readiness and willingness to act as the Court should direct in the matter.

The action was tried before BOYD, C., at Kingston, on November 28th, 1906.

*Francis H. King*, for the plaintiffs, referred to R.S.O. 1897, ch. 203, sec. 151, and to *Trusts Corporation of Ontario v. Rider* (1897), 24 A.R. 157.

*J. M. Farrell*, for the defendant.

December 1. BOYD, C.:—There is no defence raised as to the policy not being assignable, or that it can only be assigned in some particular manner, or that delivery of the policy or notice of its being assigned before death should be proved. The defendant submits his rights to the Court, he holding the moneys which the company has paid, deducting a claim of the Company which arose before notice of the assignment reached the insurance company.

The only matter to be considered is whether there has been in law upon the above state of the pleadings a sufficient assignment of the policy to entitle the plaintiff to the balance of the proceeds held by the defendant. R.S.O. 1897, ch. 203, sec. 151 (5), declares that nothing in the Act as to particular methods of assignment shall be held to interfere with the right of any person (insured) . . . to assign a policy for the benefit of any one or more beneficiaries in any other mode allowed by law. "Beneficiary" is to include every person entitled to the insurance money and the assigns of any person so entitled: sec. 2 (34).

In this case the deceased person insured borrowed \$2,000 from the plaintiff, and as security gave him a writing under his own hand stating that for collateral security "I have placed aside and assigned to you a policy of insurance in the Standard Life Assurance Company for similar amount."

The policy now in question is for \$2,000, and is no doubt sufficiently identified by this description. By this writing, which is operative as an assignment of the policy, I think the plaintiff became

as assignee "the beneficiary" for whose benefit the assignment was made within the meaning of sec. 151 (5).

The written assignment was for valuable consideration, and its effect as against the deceased and his representative is to give the equitable right and title to the policy to the plaintiff. Other creditors cannot claim as against the plaintiff, for they can take no higher rights than the debtor himself had at the time of his death: *Neale v. Molineux* (1847), 2 C. & K. 672.

Judgment should go for the payment of the fund in hand to the plaintiff less the defendant's costs to be taxed as between solicitor and client.

A. H. F. L.

Boyd, C.

1906

THOMSON  
& AVERY

v.  
MAC-  
DONNELL.

## [DIVISIONAL COURT.]

D. C.

McCORMACK v. TORONTO R.W. Co.

1906

Oct. 26.

*Damages—Assignment of Claim for—Chose in Action—Assignability of—  
Ontario Judicature Act, sec. 58, sub-sec. 5.*

1907

Feb. 18.

The plaintiff brought this action for damages for personal injuries sustained by his being run down by a car of the defendants, and for the killing of his master's horse which he was riding at the time, and in respect to which he claimed under assignment from his master :—

*Held*, that the action was properly dismissed as to the latter claim upon the ground that it was not an assignable chose in action.

THIS was an appeal from the judgment of Anglin, J., after the trial of this action, in which the circumstances of the case are fully set out.

The action was tried with a jury at Toronto on October 1st, 1906.

*J. M. Godfrey*, for the plaintiff.

*D. L. McCarthy*, for the defendants.

OCTOBER 26. ANGLIN, J.:—The plaintiff sues for personal injuries to himself sustained by his being run down by a car of the defendant company, and also for the killing of the horse which he was riding, the property of his master; claiming, as to the latter, under an assignment from the master made in consideration of the plaintiff's releasing a claim for wages amounting to \$8.

The jury found the defendants liable, and assessed the damages for the plaintiff's personal injuries at \$100, and for the killing of the horse at the sum of \$125.

The interesting question is raised by the defendants whether the right of the master to recover damages for the killing of his horse by the defendants was assignable to the plaintiff.

Section 58, sub-sec. 5, of the Judicature Act, is as follows: "Any absolute assignment, made on or after the 31st day of December, 1897, by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal chose in action of which express notice in writing shall have been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim such debt or chose in

action, shall be effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this section had not been enacted) to pass and transfer the legal right to such debt or chose in action from the date of such notice and all legal and other remedies for the same and the power to give a good discharge for the same without the concurrence of the assignor."

This statutory provision has been held to have only affected procedure, and not to have enlarged the class of things lawfully assignable. In *King v. Victoria Insurance Co.*, [1896] A.C. 250, the Supreme Court of Queensland had held that the words "debt or other legal chose in action" include "all rights the assignment of which a Court of law or equity would before the Act have considered lawful:" p. 254; and Lord Hobhouse, speaking for the Judicial Committee, said, at p. 256: "Their Lordships do not express any dissent from the views taken in the Court below of the construction of the Judicature Act with reference to the term 'legal chose in action.'" See, too, *Tolhurst v. The Associated Portland Cement Manufacturers, Ltd.*, [1902] 2 K.B. 660, at p. 676, [1903] A.C. 414, at p. 424; *The British South Africa Company v. The Companhia De Mocambique*, [1893] A.C. 602, at p. 629.

But, while the Queensland Court expressly held that a right to recover damages for injuries to a cargo of wool sustained in a collision, was a "legal chose in action," and assignable to the plaintiff as such, the Judicial Committee "prefer to avoid discussing a question not free from difficulty, and to express no opinion what limitation, if any, should be placed on the literal meaning of that term. They rest their judgment on the broader and simpler ground that a payment honestly made by insurers in consequence of a policy granted by them, and in satisfaction of a claim by the insured, is a claim made under the policy, which entitles the insurers to the remedies available to the insured": p. 256. The assignability they rest upon the right of subrogation, holding that the insurer, being thus entitled to the remedy of the insured, the assignment in writing, under the Judicature Act, was effectual to enable the insurer to sue in his own name. The assignability of such a right of recovery, therefore, apart from the right of subrogation, rests entirely upon the authority of the Supreme Court of Queensland, and not at all upon that of the Privy Council. But see *Prittie v.*

D. C.

1907

McCORMACK

v.

TORONTO

R. W. Co.

Anglin, J.



D. C.  
1907

*Connecticut Fire Insurance Company* (1896), 23 A.R. 449, at p. 453,  
*per* Osler, J.A.

McCORMACK  
v.  
TORONTO  
R.W.Co.  
Anglin, J.

In *Laidlaw v. O'Connor* (1892), 23 O.R. 696, Armour, C.J., regarding a claim by a client against a firm of solicitors for negligence in directing the distribution of certain moneys, as arising out of tort, held it not assignable. In the Divisional Court, while this judgment was affirmed, on the ground of absence of proof of negligence, MacMahon, J., treating the claim as one "arising out of contract," held it to be assignable under the provisions of R.S.O. 1887, ch. 122, sec. 7. But in *May v. Lane* (1894), 71 L.T. 869, the English Court of Appeal held that a right to recover damages for breach of contract to lend money is not assignable, Rigby, L.J., saying: "In my opinion there was nothing that could be assigned. We have been referred to the Judicature Act, sec. 25, sub-sec. 6 of which deals with absolute assignments in writing 'of any debt or other legal chose in action,' and it was said that the subject of this 'assignment,' as it is called, which at the best was only a cause of action, is a 'chose in action' within that section. That expression means a thing not in possession which can be sued for. The Judicature Act was never meant to include in it every cause of action, such as, for instance, for an assault. If that were so, the law of champerty and maintenance would be shaken. No such enormous change in the law has been made by this section": p. 870.

In *Dawson v. Great Northern and City R.W. Co.*, [1904] 1 K.B. 277, Wright, J., deeming compensation for an injury to lands under statutory authority to be in the nature of damages for a tort, held that the right to recover such compensation is not a legal chose in action, and is, therefore, non-assignable.

The Court of Appeal reversed this judgment, on the ground that such a claim for compensation is not a claim for damages for a wrongful act, [1905] 1 K.B. 260, but the Lords Justices certainly do not countenance the view that a right of action *ex delicto* is assignable.

There is a very considerable body of English authority for the proposition that a right to damages, though arising *ex delicto* is a chose in action: *Colonial Bank v. Whinney* (1885), 30 Ch.D. 261, 275, 287, (1886), 11 App. Cas. 426; *Termes de la Ley*, "Chose in Action," Blount's Law Dictionary, "Chose in Action," Williams on Personal

Property, 12th ed., p. 4. Blackstone, apparently, held the contrary view: see articles in Law Quarterly Review, vol. 10, p. 143, at p. 152; vol. 9, p. 311; vol. 20, p. 113; Warren's Choses in Action, p. 161.

In *Cohen v. Mitchell* (1890), 25 Q.B.D. 262, the plaintiff sued as assignee for valuable consideration of a cause of action for wrongful conversion of goods. After he had recovered a verdict, the trustee in bankruptcy of the assignor claimed the amount of the verdict. He failed to obtain it, his intervention being held to have been too late. Although the case went to the Court of Appeal, the validity of the assignment was not questioned. But it was not necessary to the decision that it should be passed upon.

In *Stanley v. Jones* (1831), 7 Bing. 369, at p. 375, we find this passage in the argument: "Bosanquet, J.: Could a claim for unliquidated damages arising out of *tort* be assigned? Perhaps, in some instances; as a claim for damages on the running down a ship; but not for *crim. con.* or slander. Park, J.: The distinction seems not unreasonable, and consistent with morals and law." See, too, *Simpson v. Lamb* (1857), 7 E. & B. 84.

That rights to recover damages for tort are assignable under Scotch law is distinctly affirmed in *Traill & Sons v. Actieselshabat Dalbeattie, Limited* (1904), 6 F. 798. Notwithstanding the idea of several text writers that causes of action in tort arising out of injuries to property, in which the measure of damages is certain, differ materially from causes of action arising out of personal injuries; that many objections which may be urged against holding the latter class of causes of action to be assignable do not apply to the former; and that, although the latter are non-assignable, the former may be assigned—a view which receives some support from the dictum of Park, J., in *Stanley v. Jones*, *ubi sup.*, and is held by many Courts in the United States—I can find no English or Canadian authority upon which to rest such a distinction. It is true that causes of action of the former class pass to assignees in bankruptcy, while those of the latter do not. But this is because of the construction put upon the Bankruptcy Acts. The decisions of the English Court of Appeal, in *May v. Lane*, of Wright, J., in *Dawson v. The Great Northern and City R.W. Co.*, and of Armour, C.J., in *Laidlaw v. O'Connor*, afford a body of authority which I may not disregard. They are quite inconsistent with the assignability of a cause of

D. C.

1907

McCORMACK

v.

TORONTO  
R.W.CO.

Anglin, J.

D. C.  
1907  
McCORMACK  
v.  
TORONTO  
R.W.Co.  
Anglin, J.

action *ex delicto*, though it be for injury to property as distinguished from personal injury. This view as to the non-assignability of rights to damages *ex delicto* accords with doctrines of English jurisprudence which have obtained for many years: *Y.B.* 34 Hen. VI. 30, pl. 15; *Prosser v. Edmonds* (1835), 1 Y. & C. 481, at pp. 497, 499, and, excluding American cases, is in conflict only with the Queensland decision in *King v. Victoria Fire Insurance Company*. It must, in my opinion, prevail.

There will, therefore, be judgment for the plaintiff for the sum of \$100 for his personal injuries, and dismissing the claim for damages for the destruction of the horse. As the plaintiff, apparently, brought his action for both causes in good faith and with a desire to avoid multiplicity of suits, I exercise my discretion as to costs in his favour to the extent of awarding him costs on the county court scale without set-off.

The appeal was argued on February 18th, 1907, before FALCONBRIDGE, C.J.K.B., and CLUTE and RIDDELL, JJ.

*J. M. Godfrey* and *T. N. Phelan*, for the plaintiff, appellant, contended that a chose in action is only non-assignable when to assign would amount to champerty: *May v. Lane*, 71 L.T. 869, whereas here the trial Judge had held that the transaction was *bonâ fide*, and there was no agreement for any division of the proceeds of the law suit: *Warren on Choses in Action*, ed. 1899, p. 161; that under sec. 25, sub-sec. 6, of the Judicature Act, R.S.O. 1897, ch. 51, in its present form, any legal chose in action whatever is assignable in absence of champerty: *Campbell v. Maloney* (1897) 28 S.C.R. 228; *King v. Victoria Ins. Co.*, [1896] A.C. 250; *Laidlaw v. O'Connor*, 23 O.R. 696.

*H. S. Osler*, K.C., for the defendant, was not called on.

PER CURIAM. We think the judgment appealed from quite correct, exhaustive, and complete. Appeal dismissed with costs.

A. H. F. L.











## APPENDIX.

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Cases reported in the Ontario Law Reports decided on appeal to the Judicial Committee of the Privy Council and to the Supreme Court of Canada since the publication of Volume 12, Ontario Law Reports.

GLOSTER V. TORONTO ELECTRIC LIGHT CO., 12 O.L.R. 413, reversed 38 S.C.R. 27.

GRATTAN V. THE OTTAWA SEPARATE SCHOOL TRUSTEES, 8 O.L.R. 135, 9 O.L.R. 433, in effect affirmed by BROTHERS OF THE CHRISTIAN SCHOOLS V. MINISTER OF EDUCATION FOR ONTARIO AND ANOTHER, [1907] A.C. 69.

HAMILTON, THE CORPORATION OF THE CITY OF, V. HAMILTON STREET RAILWAY COMPANY, 8 O.L.R. 455 and 10 O.L.R. 575, affirmed 38 S.C.R. 106.

HAMILTON, CITY OF, V. THE HAMILTON DISTILLERY CO., 10 O.L.R. 280, 12 O.L.R. 75, affirmed 38 S.C.R. 239.

KING, THE, V. THE BANK OF MONTREAL, 10 O.L.R. 117, 11 O.L.R. 595, affirmed 38 S.C.R. 258.

KING, THE, V. SAUNDERS, 12 O.L.R. 615, affirmed 38 S.C.R. 382.

WABASH RAILWAY V. MISENER, 12 O.L.R. 71, affirmed 38 S.C.R. 94.





# INDEX.

## ABANDONMENT.

*By Plaintiff of Portion of His Claim.*—See DAMAGES, 1.

## ACCOUNTS.

*Of Executor.*—See EXECUTORS AND ADMINISTRATORS.

*Rendered, Checked and Entered, should not be Disturbed.*—See PARLIAMENT.

## ACTION.

*Cause of—Where Arising.*—See DIVISION COURTS.

## ADMINISTRATOR.

*Of Foreigner—Right to Damages for Deceased's Family—Foreigners Residing out of Canada.*—See NEGLIGENCE, 3.

See EXECUTORS AND ADMINISTRATORS.

## ALIENATION.

*Restraint on.*—See WILL, 3.

## ALIMONY.

See HUSBAND AND WIFE.

## APPEAL.

*Divisional Court—Leave to Appeal to the Court of Appeal—Practice—Conflicting Decisions.*—Leave to appeal to the Court of Appeal from the judgment of a Divisional Court granted in a case in which the scale of costs taxable

was in question, the point being one of considerable practical importance, and there being differences of opinion in the cases already decided. *Stephens v. Toronto Railway Co.*, 107.

*From Ruling of Judge in Election Case.*—See PARLIAMENTARY ELECTIONS.

*Right of Appellate Court to Review Inferences of Trial Judge.*—See NEGLIGENCE, 1.

*None Lies to a Divisional Court from an Order Dismissing a Motion for a New Trial in County Court Term in a Case Tried with a Jury.*—See COUNTY COURTS.

*From a County Court where Findings of a Jury are Reversed in Term.*—See COUNTY COURTS.

*To Supreme Court—Special Grounds—Dissenting Judges.*—See SUPREME COURT OF CANADA.

*Effect of Want of Notice of, in Mining Case.*—See MINES AND MINERALS.

## ARBITRATION AND AWARD.

*Submission—Time for Award—Failure of Arbitrators to Extend—Action—Defence of Arbitration Pending—Stay of Proceedings.*—A submission to arbitration, dated the 4th October, 1904, was under seal, and bound the parties to abide by the award so as it was made on or before the 30th October, 1904, or any subsequent day to which the arbitrators should by writing extend the time. There was no covenant not to take other

proceedings. The arbitrators proceeded to consider the matters referred to them and continued the arbitration, with the assent of the parties, for nearly two years, but did not by writing extend the time for the award. The plaintiff brought this action for an account in respect of the matters referred, the arbitration being still uncompleted, and the defendant pleaded the submission and proceedings of the arbitrators as an answer to the action:—

*Held*, that the assent of the parties to the arbitration being proceeded with after the time had expired was equivalent to a parol submission only; sec. 3 of the Arbitration Act, which makes submissions of the same effect as an order of the Court, and irrevocable without leave of the Court, applies, by virtue of sec. 2, to submissions in writing only; the same is the case with sec. 6, which allows an application to stay proceedings; no order extending the time had been made under sec. 10; and therefore the arbitration proceedings afforded no answer. *Ryan v. Patriarche*, 94.

## ASSESSMENT AND TAXES.

1. *Tax Sale—Invalidity—Lands not Included in List of Lands Liable to Sale—Vague Description in Assessment Rolls—Non-compliance with Assessment Act—Lien for Purchase Money—Lien for Subsequent Taxes—Interest—Rents and Profits—Improvements.*]—A sale to the defendant on the 10th April, 1901, and a subsequent conveyance of lots 2 and 3 in block B. on the east side of Gladstone avenue on plan 396, in the city of Toronto, for the arrears of taxes thereon for the years 1893 to 1898,

inclusive, were set aside, for the direct breach of sec. 176 of the Assessment Act, R.S.O. 1897, ch. 224, the provisions of which are imperative, by selling in April, 1901, without having either in the preceding January or in January, 1900, which preceded the date of the mayor's warrant, included the two lots in the list of lands liable to sale furnished to the clerk under sec. 152; and also because the description of the lands in the assessment rolls from 1893 to 1898 was too vague and indefinite to be a compliance with the Act: see secs. 13, 29, 34.

The assessments being invalid, the defendant was not entitled to a lien under sec. 218 for the amount of purchase money paid by her, but was entitled to a lien for taxes paid by her for the years 1900 to 1906, inclusive, the assessment for those years being sufficient, and interest thereon, but less the rents and profits derived therefrom, subject to a deduction for repairs, improvements, etc.

*Fenton v. McWain* (1877), 41 U.C.R. 239, and *Wildman v. Tait* (1900-1), 32 O.R. 274, 2 O.L.R. 307, followed. *Carter v. Hunter*, 310.

2. *Mining Lands—Value as Agricultural Lands—Buildings—Plant—Wrongful Assessment—Illegality—Jurisdiction of the Court—Provisions of Assessment Act.*]—Mining lands were assessed at their value as agricultural lands under sub-sec. 3 of sec. 36 of the Assessment Act of 1904. The assessor also assessed the buildings and mining plant as such, and adding the two latter together entered them on the roll as the assessed value of the buildings:—

*Held*, that that method was an

attempt to evade the fair meaning of the Act, and that the assessment of the exempted property, the plant, was illegal. It was not for the assessor in the exercise of his judgment to assess the exempted property for taxation at any amount; and the illegality being established the Court had jurisdiction to deal with the matter outside of the machinery provided by the Assessment Act for dealing with such a complaint.

Judgment of *BOYD, C.*, reversed. *Canadian Oil Fields Co. v. Village of Oil Springs*, 405.

### ASSESSOR

*Duty of, in the Case of Mining Lands.*]—See **ASSESSMENT AND TAXES**, 2.

### ASSIGNEE.

*For the Benefit of Creditors—Rights of, as Against Execution Creditor to Redeem Mortgage Made by Assignor.*]—See **MORTGAGE**.

### ASSIGNMENT.

*Of Life Insurance Policy by Informal Document.*]—See **LIFE INSURANCE**.

*Of Chose in Action.*]—See **DAMAGES**, 2.

### ATTACHMENT OF DEBTS.

*Police Constable's Pay—Service on Treasurer—Payment to Agent—Payment in Advance.*]—On a motion to make absolute an order attaching all debts due by a municipal corporation to the defendant, a police constable, which was issued on the 27th of February, and served on the treasurer of the corporation on the afternoon of

the same day, it appeared the defendant's salary was \$900 a year, payable monthly at the end of each month:—

*Held*, that although the defendant was not a servant of the corporation the treasurer was the proper person to serve.

*Held*, also, that the cheque for the defendant's salary for the month of February, which, according to custom, had been delivered to a messenger to leave at the police station for the defendant, but on service of the order, had been stopped by telephone and brought back to the treasurer, had not come into the hands of the defendant's agent before service of the order; but

*Held*, also, that there was no debt due as the month's salary was not payable until the end of the month, and that there is no law which forbids an employer to pay his servants' wages in advance. *Fallis v. Wilson*, 595.

### ATTORNEY-GENERAL.

*Not Necessarily a Party in a Highway Action.*]—See **HIGHWAY**, 3.

### AWARD.

See **ARBITRATION AND AWARD**.

### BAILOR AND BAILEE.

See **NEGLIGENCE**, 1.

### BANKRUPTCY AND INSOLVENCY.

*Preferential Transfer of Cheque—Deposit with Private Banker.*]—*Application by Banker upon Overdue Note—Absence of*



*Pre-arrangement and of Intent to Prefer.*—An appeal by the plaintiff from the judgment of the Divisional Court, reported 12 O.L.R. 91, affirmed, on the ground that the transaction was a payment of money to a creditor within the meaning of the Act, R.S.O. 1897, ch. 147, sec. 3, sub-sec. 1. *Robinson et al. v. McGillivray et al.*, 232.

### BENEFIT SOCIETY.

*Rights of Member — Action to Establish — Domestic Forum — Submission to Jurisdiction.*]—An action to establish the right of a person to membership in a benefit society will not be entertained by the Court, even where the society submits to the jurisdiction, until the remedies provided by the constitution of the society have been exhausted.

A dispute arose as to the plaintiff's right to continue to be a member of the defendant society, and a body of officials of the society decided against him; the plaintiff, instead of appealing to the Grand Lodge, as permitted by the constitution (by which he was admittedly bound), brought an action against the society. The action was dismissed, but without costs, and without prejudice to any other action being brought after the remedies provided by the constitution should be exhausted. *Zilliar v. Independent Order of Foresters*, 155.

### BILLS OF EXCHANGE.

*Absence of Consideration — Evidence, Admissibility of — New Trial.*]—In an action upon two promissory notes for \$3,000 and \$4,000 respectively, the defendants set up want of consideration

and that the plaintiff was not a *bonâ fide* holder for value. At the trial the defendants tendered evidence, which was refused, to shew that the notes were given merely as receipts for stock which had been delivered to defendants for sale as agents, that there was no consideration for the notes, and that the plaintiff, who was a clerk in the office of his solicitors, had given no value therefor; also that a written agreement for the transfer of the stock made between the payee of the note and another, and one of the defendants' firm, had never been acted upon, or had been abandoned:—

*Held*, that whether or not evidence was admissible to shew that the notes were given as receipts, the defendants were entitled to give in evidence all the facts which would tend to establish want of consideration, and this having been denied them, a new trial was directed. *Clarke v. Union Stock Underwriting Co.*, 102.

### BY-LAW.

*Invalidity of, when the Time and Place where the Votes are to be Summed up are Omitted.*]—See INTOXICATING LIQUORS.

### CARRIERS.

*Express Company — Contract to Forward Perishable Goods — Delay in Transmission — Gross Negligence — Railway Company — Agent or Servant — Notice of Claim for Damage to Goods — "At this Office."*]—The defendants undertook to forward a consignment of fish from Selkirk, Manitoba, to Toronto, Ontario, subject to certain conditions expressed in the contract:—

*Held*, that the defendants' engagement implied that a safe and rapid transit would be furnished for the whole distance, and that contract was broken when the perishable goods were transferred to a freight train at Winnipeg, by which delivery was delayed; and this was negligence for which the defendants were liable as common carriers.

A special condition that the defendants should not be liable for loss or damage, unless it should be proved to have occurred from the gross negligence of the defendants or their servants, did not avail the defendants, because the railway companies employed by the defendants for the transaction of their business were to be regarded as the defendants' servants, and the negligence was to be accounted gross negligence.

Another condition was that a claim for loss or damage should be presented to the defendants in writing "at this office":—

*Held*, that presentation at the head office of the defendants satisfied this requirement.

Judgment of CLUTE, J., affirmed *F. T. James Co. v. Dominion Express Co.*, 211.

### CASES.

*Babcock v. Standish*, 19 P.R. 195, approved.]—See COSTS, 3.

*Baker v. Harris*, 16 Ves. 397, applied.]—See MORTGAGE.

*Cutten v. Mitchell*, 10 O.L.R. 734, discussed.]—See DISCOVERY, 1.

*Fenton v. McWain*, 41 U.C.R. 239, followed.]—See ASSESSMENT AND TAXES, 1.

*Harvey v. Facey*, [1893] A.C. 552, followed.]—See VENDOR AND PURCHASER, 2.

*Long Point Company, v. Anderson, In re*, 18 A.R. 401, followed.]—See PROHIBITION.

*McSheffrey v. Lanagan*, 20 L.R. Ir. 528, approved.]—See COSTS, 3.

*Wildman v. Tait*, 32 O.R. 274, 2 O.L.R. 307, followed.]—See ASSESSMENT AND TAXES, 1.

*Wilkinson v. Howel*, Moo. & M. 495, followed.]—See MALICIOUS PROSECUTION, 2.

*Radley v. London and North-Western R.W. Co.*, 1 App. Cas., applied.]—See NEGLIGENCE, 4.

*Saunders v. City of Toronto*, 26 A.R. 265, followed.]—See NEGLIGENCE, 1.

*Scott v. Dublin and Wicklow R.W. Co.*, 11 Ir. C. L.R. approved.]—See NEGLIGENCE, 4.

### CHOSE IN ACTION.

See DAMAGES 2.

### COMMISSIONER.

*Mining.*]—See MINES AND MINERALS.

### CONDITIONS.

*Special, in Contract.*]—See CARRIERS.

### CONSIDERATION.

*Absence of, in Promissory Notes.*]—See BILLS OF EXCHANGE.

*Absence of, in Option to Sell Lands.*]—See VENDOR AND PURCHASER, 3.

## CONSOLIDATED RULES.

See RULES.

## CONSTITUTIONAL LAW.

1. *Mechanics' Lien Act—Railways—Dominion Act.*]—The *Mechanics' and Wage Earners' Lien Act*, R.S.O. 1897, ch. 153, does not apply to a railway company incorporated under a Dominion Act and declared thereby to be a company incorporated for the general advantage of Canada. *Crawford v. Tilden*, 169.

2. *Powers of Provincial Legislature—B.N.A. Act, sec. 92, sub-sec. 2—Act Respecting Licensing of Extra Provincial Corporations—Intra vires—Company Carrying on Business in Ontario.*]—The plaintiffs, a company incorporated in the State of Pennsylvania, to carry on a printing, publishing, and bookbinding business, with the head office in that state, had, as one of its departments, under a special charter therefor, procured in the same State, and with the same head office, what was called "The International Correspondence School," the object being to give by correspondence through the mails, instruction to applicants for enrollment as students, the company having representatives throughout the Province for procuring such applications, all of which were submitted to the head office for approval, and, if accepted, the certificates of enrollment were sent direct to the students with the lesson and instruction papers, followed at stated intervals by further instruction and lesson papers, pamphlets, etc., and when the contract so provided, lesson books in bound form, drawing materials,

phonographic and other outfits, were loaned to the students. The company had an office in Toronto, over which their name was affixed, with a superintendent, cashier, and number of stenographers, to which all monies collected in this Province were forwarded, and from there remitted to the head office; while the bound lesson books, etc., for convenience of passage through the customs were sent from the head office to Toronto, and after the payment of the duties were forwarded by the postmaster to the students. Salaries were paid by the cashier at Toronto out of the moneys in his hands:—

*Held*, that the Act 63 Vict. ch. 24 (O.) for licensing of extra provincial corporations, was *intra vires* the Provincial Legislature as coming within sec. 92, sub-sec. 2 of the B.N.A. Act, being a mode of direct taxation within the Province, or as relating to the issuing of licenses in order to the raising of a revenue; and that the plaintiffs were carrying on business in Ontario within the meaning of the Act, so as to necessitate their taking out a license, and their omission to do so precluded them from maintaining an action for the recovery of moneys claimed to due from one of the enrolled students. *International Text-Book Company v. Brown*, 644.

## CONTRACT.

*Construction — Sale of Wheat — Correspondence by Telegraph—Price of Wheat—Ascertainment by Reference to Quotations—Evidence—Trade Usage or Custom.*]—On the 22nd May, 1903, the plaintiffs, grain merchants at Winnipeg, Manitoba, telegraphed to the de-



defendants at Goderich, Ontario: "Referring to my telegram we offer subject to immediate reply by telegraph one cargo about eighty thousand bus. part number one hard three over part number two northern one quarter under New York July c.i.f. Goderich in ten days, terms twenty-five thousand sight draft balance weekly payments as suggested int. and ins. Goderich paid by you as before if you wish will fix price to-day's close hard eighty-two cents two northern seventy-eight and three quarters telegraph immediately whether you accept or not can give you more two northern than one H."

The defendants telegraphed to the plaintiffs on the next day: "We accept half one hard half two northern price fixed date shipment or sooner."

Five days later the plaintiffs telegraphed to the defendants: "Probably send Algonquin tomorrow takes about fifty-eight thousand two northern thirty-seven thousand one hard do you want the surplus fifteen thousand two northern one half under July telegraph immediately on receipt."

And on the same day the defendants telegraphed to the plaintiffs: "We accept will provide insurance here see to-day's letter."

The 95,000 bushels of wheat mentioned were shipped and received by the defendants, and, a dispute having arisen as to the price, the plaintiffs withheld the bill of lading for 10,000 bushels of the 95,000, and the defendants having, notwithstanding the absence of the document, taken the 10,000 bushels, the plaintiffs brought this action for conversion thereof, or alternatively for the balance of the price. The defen-

dants maintained that the price was paid in full:—

*Held*, that there was a complete contract for the sale of the goods in question, at a price to be fixed, on or before the date of shipment, by reference to New York quotations; and that the words used by the plaintiffs "three over . . . one quarter under New York July" had not the effect of importing into the contract a term, in accordance with a custom or trade usage of the wheat market at Winnipeg, of which evidence was given at the trial subject to objection, that the buyer was bound to sell a similar quantity of New York Wheat to the original vendor.

Judgment of FALCONBRIDGE, C.J.K.B., affirmed. *Northern Elevator Co. v. Lake Huron and Manitoba Milling Co.*, 349.

## CONVEYANCE.

*Action to Set Aside, Adding Parties.*—See PARTIES, 1.

*Of Land by Parent to Child subject to Maintenance.*—See PARENT AND CHILD.

## COSTS.

1. *Taxation — Preparing for Trial—Searches for Missing Documents—Party and Party Costs—Tariff—Con. Rule 1178.*—In this action a certain contract and certain plans of material import-ance were lost, and the plaintiffs employed two of their former solicitors to try and find them, which they succeeded in doing, and they were put in evidence at the trial. For these services a sum of \$350 was paid to them:—



*Held*, that this expenditure was properly taxable among the plaintiffs' party and party costs, though not specially provided for in the tariff. *The Corporation of the City of Toronto v. The Grand Trunk R.W. Co. et al.*, 12.

2. *District Court—R.S.O. 1897, ch. 109, sec. 11—Action Beyond Jurisdiction of County Court—Discretion of District Judge as to Scale of Costs—Rules of Court—Application of.*]—Where, in an action tried before a district court Judge, without a jury, there is a recovery for an amount beyond the jurisdiction of the county courts the Judge is not compelled, under sec. 11 of the District Courts Act, R.S.O. 1897, ch. 109, read in the light of the Rules of Court applicable thereto, either to withhold costs altogether or to grant a certificate therefor on the High Court scale. He has a discretionary power, and may certify for costs on the county court scale only. *Schaeffer v. Armstrong*, 40.

3. *Scale of—Payment of Money into Court with Defence—Acceptance in Satisfaction—Amount within Jurisdiction of Inferior Court—Con. Rules 425, 1132, 1133.*]—Where money is paid into Court by the defendant with his defence, and taken out by the plaintiff in satisfaction of all the causes of action, the plaintiff is entitled to tax his costs on the scale of the Court in which the action is brought, even where the amount paid in and accepted is within the competence of an inferior Court.

Construction of Con. Rules 425, 1132, 1133.

*Babcock v. Standish* (1900), 19 P.R. 195, and *McSheffrey v. Lanagan* (1887), 20 L.R. Ir. 528, approved.

Order of a Divisional Court affirmed. *Stephens v. Toronto R.W. Co.*, 363.

4. *Defamation—Verdict for Defendant—Depriving Defendant of Costs—Discretion—Good Cause—Con. Rule 1130—English Order 65, Rule 1.*]—In the exercise of his discretion in depriving a successful defendant of his costs, the trial Judge is not obliged to find, under Con. Rule 1130, what would necessarily be "good cause" under the English Order 65, Rule 1; at the same time he must not exercise his discretion arbitrarily, but for a reason which reasonably satisfied him that it should be so exercised.

In an action of slander a successful defendant was disallowed his costs, where the trial Judge was satisfied that the defendant by his conduct had provoked the litigation, and had really made use of the words attributed to him, notwithstanding the finding of the jury to the contrary, and had refused to carry out a proposed settlement which he had at first acceded to, and the jury had intimated that the costs should be equally divided between the parties. *Byers v. Kidd*, 396.

## CORROBORATION.

*Required under Sec. 684 of the Criminal Code.—See CRIMINAL LAW.*

## COUNTY COURTS.

*Right of Appeal From—Jury—Order of County Court in Term—County Courts Act, sec. 51.*]—Under sec. 51 of the County Courts Act, R.S.O. 1897, ch. 55, where there has been a trial by a jury of an action in a county

court, and a motion has been made to the county court in term for a new trial, and dismissed, no appeal lies from the dismissing order to a Divisional Court of the High Court; but, *semble*, where the findings of the jury are reversed in term, an appeal lies. *Booth v. Canadian Pacific R.W. Co.*, 91.

## CRIMINAL LAW.

*Corroboration — Having Illicit Intercourse with Girl of Previously Chaste Character—Criminal Code—New Trial—Case Stated—55-56 Vict. c. 29 (D.), secs. 684, 742, 743.*—Section 684 of the Criminal Code, 55-56 Vict. ch. 29 (D.), which enacts that a person accused of offences of the nature therein indicated, *inter alia* of having illicit intercourse with a girl of previously chaste character, is not to be convicted upon the evidence of one witness unless such evidence is corroborated in some material particular, does not make it necessarily incumbent upon the Crown to adduce testimony of another or other witnesses to the acts charged. It is enough if there be other testimony to facts from which the tribunal trying the case, weighing them in connection with the testimony of the one witness, may reasonably conclude that the accused committed the act with which he is charged.

New trial ordered after a case stated under sec. 743 of the Criminal Code, and the propriety of so doing discussed. *The King v. Burr*, 485.

## DAMAGES.

1. *Abandonment of Portion of—Claim Held to be Limited to Balance — Appeal to Privy Coun-*

*cil.*—The plaintiff, in a Superior Court, may at any time abandon a part of his claim and upon such abandonment the remainder only is deemed to be in controversy.

On the trial of an action in which the damages were laid at \$5,000, a nonsuit was entered, but it was agreed that in case the plaintiff should, on appeal, be held entitled to maintain the action, the damages should be fixed at \$1,000. On appeal to a Divisional Court, the plaintiff was held so entitled, and a new trial was directed unless the defendants consented to judgment for the \$1,000. This the defendants refused to do, and appealed to the Court of Appeal, when the judgment of the Divisional Court was affirmed. An application was then made for leave to appeal to the Privy Council, on the ground that the matter in controversy exceeded \$4,000. In answer thereto the plaintiff, by affidavit, stated that he was only claiming \$1,000, which he regarded as agreed upon for all purposes, and offered to amend his statement of claim:—

*Held*, that the application must be refused, as the damages must be deemed to be limited to the \$1,000. *Preston v. The Toronto R.W. Co.*, 78.

2. *Assignment of Claim for—Chose in Action—Assignability of—Ontario Judicature Act, sec. 58, sub-sec. 5.*—The plaintiff brought this action for damages for personal injuries sustained by his being run down by a car of the defendants, and for the killing of his master's horse which he was riding at the time, and in respect to which he claimed under assignment from his master:—

*Held*, that the action was

properly dismissed as to the latter claim upon the ground that it was not an assignable chose in action. *McCormack v. Toronto R.W. Co.*, 656.

## DEVOLUTION OF ESTATES ACT.

*Administrator, Only Adult Interested in Real Estate—Consent—Registration of Caution.*]—An intestate owning real estate left her surviving her husband and two infant children. Letters of administration were granted to the husband, who registered a caution under sub-sec. 5, sec. 14, of the Devolution of Estates Act, R.S.O. 1897, ch. 127, and with the consent of the Official Guardian sold the real estate. On an application under Con. Rule 972:—

*Held*, that although administrator, he being the only adult interested in the real estate, was not deprived of his right to consent, and that his application to register the caution was sufficient evidence of such consent. *Re Hart Estate*, 379.

## DISCOVERY.

1. *Production of Books — Postponement—Profits of Business—Master and Servant Act, secs. 3, 4—Application to Contract Alleged—Statement of Profits—Right to Impeach.*]—In an action to recover a share of the profits of a business under an alleged agreement to share profits, the plaintiffs sought discovery of the books of the defendant:—

*Held*, that the consideration of the matter should be postponed until it had been properly determined in the action, as a matter of law and not upon an inter-

locutory motion, first, whether the agreement alleged by the plaintiffs was within secs. 3 and 4 of the Master and Servant Act, R.S.O. 1897, ch. 157, and, second, whether (if it was) the statement of profits declared by the defendant could be impeached for fraud, error, mistake, or other like cause.

*Cutten v. Mitchell* (1905), 10 O.L.R. 734, discussed. *England et al. v. Mitchell et al.*, 184.

2. *Medical Examination before Statement of Defence—Con. Rules 442 and 462.*]—An examination under Con. Rule 462 is an examination for discovery, and that rule must be applied in the same way as Con. Rule 442; and an order for the medical examination of the plaintiff, in an action where the liability is disputed, will not be made if opposed, before the delivery of the statement of defence. *Burns v. Toronto R.W. Co.*, 404.

3. *Next Friend of Infant Plaintiff—Right to Examine—Con. Rules 439, 440—English Order XXXI., Rule 29.*]—The next friend of an infant plaintiff is not examinable for discovery.

The distinction between Con. Rules 439, 440, and English Order XXXI., Rule 29, pointed out. *Vano v. The Canadian Coloured Cotton Mills Co.*, 421.

4. *Production — Accident — “Recklessly and Negligently” Driving.*]—In an action for injuries to the plaintiff and his carriage, alleged to have been caused by the defendant's servants driving “recklessly and negligently,” on an examination of the defendant for discovery, he gave the names of his men who were with



his waggon at the time of the accident, but he could not give the weight of the load without his books, which he declined to produce. After the examination was adjourned for the purpose of a motion to compel their production, his solicitors wrote a letter that the defendant's team was coming from a house on a certain street, and that the weight of the load and waggon together was not less than three tons. This the plaintiff declined to accept as sufficient:—

*Held*, that as the plaintiff's case rested on "recklessly and negligently driving horses and a conveyance," which the defendant contended was impossible, on account of the weight of the load; and as it might assist the plaintiff to find out what house the team was coming from and the weight of the load, the books must be produced. *Boyd v. Marchmont*, 468.

### DIVISION COURTS.

*Acceptance of Goods—Cause of Action—Statute of Frauds—Jurisdiction—Prohibition.*—In an action for \$45 the price of a coat ordered by the defendant in Toronto to be made and sent by the plaintiff to him at Belleville by express:—

*Held*, that the plaintiff must prove as part of his case an acceptance of the coat at Belleville and that certain letters written by him at Belleville to the plaintiff at Toronto while evidence from which acceptance might be inferred were not the acceptance itself: and as the plaintiff failed to prove this, the whole cause of action did not arise at Toronto within the juris-

diction of the division court in which the plaint was brought.

Prohibition ordered. *Re Taylor v. Reid*, 205.

### DIVISIONAL COURT.

*Appeal to.*—See COUNTY COURTS.

### DRAINAGE.

*Engineer's Report—Delay in Filing—Extension of Time—Alteration and Enlargement of Scheme—Municipal Drainage Act, R.S.O. 1897, ch. 226, sec. 9, sub-sec. 8—62 Vict. (2) ch. 28, sec. 6 (O.).*—The power of extending the time for filing the report of an engineer upon a municipal drainage scheme, by sec. 9, sub-sec. 8, of the Municipal Drainage Act, as amended by 62 Vict. (2) ch. 28, sec. 6 (O.), can only be exercised under the condition mentioned in that sub-section. It is a limited power to extend for good cause, and is dependent upon inability of the engineer to make a report within the time fixed owing to the nature of the work, and not upon dilatoriness or supineness on his part.

An engineer was appointed to make examination and report in 1900, but did nothing within the first six months after his appointment. Various extensions were granted, several after the extended time had expired. No report was made till February, 1905, and such report was after amendment adopted by the council in June, 1905, and a by-law founded upon it, the engineer advancing no excuse for delay except press of work and lack of assistance:—

*Held*, that when the report was made the petition was not on foot, and therefore there was no war-



rant to the council for adopting the report or founding a by-law upon it. *In re McKenna and The Municipal Corporation of the Township of Osgoode*, 471.

### ELECTION.

*Of Plaintiff, as to which Defendant to Proceed Against.*]—See PLEADING.

### ELECTIONS.

*Scrutiny in Election Cases.*]—See PARLIAMENTARY ELECTIONS.

### ESTOPPEL.

*Accounts of Municipal Treasurer—Recovery from Municipality of Moneys Paid by Treasurer Out of His Own Pocket—Statement of Account—Audit—Laches.*]—In February, 1899, the defendants appointed the plaintiff treasurer *pro tem.*, and gave him an order expressed to be on "the treasurer of the township of Malahide," for \$5,799.52, balance in hand of the previous treasurer at the time of his death. The plaintiff carried forward this balance in his cash book, though he had not in fact received the money, and went on honouring orders upon him drawn by the defendants, and his statement of receipts and expenditures for the year 1899 was prepared and audited as if there had been no change in the treasurership; and although long before the end of 1899 the estate of the deceased treasurer proved to be insolvent, he continued from year to year pursuing the same course, shewing each year balances in favour of the township non-existent except upon the footing of his having actually received the \$5,799.52. During 1899 he proved the debt

against the deceased treasurer's estate in the name of the defendants, and received two dividends and a third in 1901, amounting to \$1,481.56. He did not, however, bring the facts directly to the notice of the council or make any claim against the township until 1905; and the defendants apparently remained in ignorance of the facts until shortly before this action was brought to recover the balance due the plaintiff:—

*Held*, that the plaintiff was entitled to recover, as there had been no direct representation by him that the original order given him by the defendants had been paid, and the advances subsequently made by him were all made on orders given by the defendants in respect to the ordinary debts and expenditures of the township; and the defendants had incurred, so far as appeared, no debts or liabilities, and had entered upon no expenditures or undertakings which they would not have done if they had received the clearest notice at the earliest moment, that their late treasurer's estate was insolvent.

*Held*, however, that there must be a reference to the Master to report as to any loss defendants might have sustained by the plaintiff's laches, and the amount for which the plaintiff was entitled to judgment should be reduced accordingly. *Leslie v. Corporation of Township of Malahide*, 97.

### EVIDENCE.

*Corroboration.*]—See CRIMINAL LAW.

*Right to Give, to Show Absence of Consideration in Promissory Note.*]—See BILLS OF EXCHANGE.

*Recital in Deed over Twenty Years Old.*—See VENDOR AND PURCHASER, 1.

### EXAMINATION.

*Medical, before Statement of Defence.*—See DISCOVERY, 2.

### EXECUTORS AND ADMINISTRATORS.

*Passing of Accounts — High Court — Reference to Take Accounts in Master's Office — Prior Account in Surrogate Court — Effect of — Consent Judgment — Trustees*—R.S.O. 1897, ch. 59, sec. 72; 63 Vict. ch. 17, sec. 18 (O.); 5 Edw. VII. ch. 14 (O.)—*Con. Rules* 666, 667.]—By sec. 72 of the Surrogate Courts Act, R.S.O. 1897, ch. 59, "Where an executor or administrator has filed in the proper surrogate court an account of his dealings with the estate of which he is executor or administrator, and the Judge has approved thereof in whole or in part, if the executor or administrator is subsequently required to pass his accounts in the High Court, such approval, except in so far as fraud or mistake is shewn, shall be binding upon any person who was notified of the proceeding taken before the surrogate Judge, or who was present or represented therein, and upon every one claiming under such person."

The defendant, an executor brought into the proper surrogate court the accounts of certain estates of which he was the executor, which were passed by the Judge, in the presence of the solicitor for the plaintiff, a beneficiary. Subsequently the plaintiff brought an action in the High Court, and without any pleadings being delivered, an order was

made, by consent, for the removal of the executor and the appointment of a trust company in his place, and for the passing of the accounts, adopting the common form of the order for such purpose:—

*Held*, that on the taking of the accounts in the Master's office the account taken and passed by the surrogate court Judge was under sec. 72, no mistake or fraud having been shewn, binding on the plaintiff, for notwithstanding such consent the judgment must be construed as if made *in invitum*, and the usual rules of law and procedure, statutory and otherwise, applied thereto.

63 Vict. ch. 17, sec. 18 (O.), 5 Edw. VII., ch. 14 (O.) and *Con. Rules* 666 and 667 referred to as to the powers and duties of the Master in taking accounts, sec. 72 applying to trustees as well as executors. *Gibson v. Gardner*, 521.

### EXPROPRIATION.

*Power of.*—See MUNICIPAL CORPORATIONS, 2.

### FACTORIES ACT.

*Privies — "Factory" — "Owner" — "Employed."*]—*Held*, that a store occupied by merchant tailors, the rear part being used as a tailoring department and the front as a retail sale department, fourteen persons being employed in the former, was a "factory" as defined by sec. 2, sub-sec. 1. (c) of the Ontario Factories Act, R.S.O. 1897, ch. 256, and the amendments thereto.

Under sec. 15 as amended by 4 Edw. VII. ch. 26, sec. 3 (O.), which provides that the "owner" of every factory shall provide a

sufficient number of privies, etc., the owner of the building is plainly intended, who may or may not be also the employer. *Rex ex rel. Burke v. Ferguson*, 479.

### FIRE INSURANCE.

*Lease—Change in Nature of Risk—Absence of Notice or Knowledge by Landlord—3rd Statutory Condition—Control of Landlord—Omission to Notify Insurance Company.*—After the owner of dwelling-house property had effected an insurance thereon he leased the premises to a tenant who, without the owner's knowledge, changed the occupation thereof, by bringing in a stock of goods, which he sold out to pedlars:—

*Held*, that the owner was not affected by the third statutory condition, R.S.O. 1897, ch. 203, sec. 168 (3), which requires notice of any change material to the risk within the control or knowledge of the insured, to be given to the company, for, being under lease, the premises were not under the owner's control, while the change in the occupation was without his knowledge, and the fact that the change was made by the tenant after the making of the policy was immaterial.

Judgment of FALCONBRIDGE, C.J., at the trial reversed. *London and Western Trust Co. v. The Canada Fire Insurance Co.*, 540.

### FRAUDULENT CONVEYANCE.

*See* CONVEYANCE.

### HIGHWAY.

1. *Dedication—Plan—Registration Before Incorporation* — R.S.O. 1887, ch. 152, sec. 62.]—A plan

showing the *locus in quo* as a street was made and filed before, but practically contemporaneously with, the locality being set apart as an incorporated village, the former being on June 3rd, 1873, the latter on June 25th, 1873. The lots were first sold under the plan in 1876. Subsequent legislation which was retroactive declared that allowances for roads laid out in cities, towns and villages, fronting upon which lots had been sold, should be public highways:—

*Held*, that the road in question was a public highway and subject to the jurisdiction of the municipality. *McGregor v. The Municipal Corporation of the Village of Watford et al.*, 10.

2. *Obstruction—Municipal Corporation—Misfeasance—Liability for Wrongful Acts of Committee of Council—Injury to Traveller—Damages.*]—The municipal council of a township, having decided to construct a ditch along a highway, under the provisions of the Ditches and Watercourses Act, appointed three of their number a committee to meet on the highway, and there to let the contract for the work by public competition. This the committee did, and, in order to indicate where the ditch was to be constructed, they drove stakes in the highway, one being near the centre of the travelled portion. The contract was let, and the stakes were left in position, projecting about six inches above the ground, and unprotected by barrier, light, or otherwise. One of the plaintiffs, in walking upon the highway, struck her foot against one of the stakes, and was thrown to the ground, and injured:—



*Held*, that the injury was caused by misfeasance, and that the municipal corporation were liable for the acts of the committee, who were acting within the scope of their authority.

Damages were assessed for the plaintiff who was injured at \$1,500 and for her husband at \$500. *Biggar et ux. v. Township of Crowland*, 164.

3. *Dedication—User by Public—Action—Parties—Attorney-General.*—In an action for a declaration that a portion of the River road lying between Bugar and Dorothy streets, in the town of Welland, was not a highway, but the private property of the plaintiffs:—

*Held*, reversing the judgment of Anglin, J., 12 O.L.R. 362, that the evidence did not establish dedication, and that the plaintiffs were entitled to succeed.

*Held*, also, that the Attorney-General was not a necessary party. *Maccomb et al. v. Town of Welland*, 335.

4. *Stream—Breaking through Dams—Bridge Over Stream Stopping Flow of Water—Destruction of Highway—Duty of Municipality to Repair, Reasonable Cost—Damages—Mandamus—Indictment—Injunction.*—Where the destruction of a highway is caused by the gradual encroachment of the sea or a lake, arising from natural causes, the water occupying the former location of the highway, and whereby there is a change of ownership in the land encroached upon, it becoming vested in the Crown, and available for purposes of navigation, there is no liability on the part of the municipality, by virtue of its duty to

keep highways in repair, to replace the highway; but if the element of ownership does not arise, a duty to repair may exist where the destruction is of such a character, taking into consideration the cost of repair, that the restoration of the highway may not unreasonably be regarded as coming within the bounds of such duty.

In a creek, in the town of Dundas, a couple of dams built some sixty years ago had broken away, whereby large quantities of stones, sand and other débris were carried down and deposited in the channel adjacent to the plaintiff's land, the accumulation being added to by a bridge across the creek, built by a railway company, which choked the flow of the water, the effect being that a portion of the highway in front of the plaintiff's land, and which was the only mode of ingress and egress to and from it, was washed away, rendering it difficult for two vehicles to pass each other.

By removing the check to the flow of the water, caused by the bridge, and by the expenditure of \$150, a roadway 30 feet wide could be furnished, while at a cost of \$800 a permanent and satisfactory roadway could be provided:—

*Held*, no question of ownership arising, and taking into consideration the cost of repair, that the destruction of the highway was not of such a character as would relieve the municipality from their obligation to repair; and that they were liable to the plaintiff for the special damage he had sustained by reason of their neglect.

A mandamus will not be granted in such a case.



If the relief sought was as one of the public the remedy would be by indictment.

An injunction was also refused, it not appearing that the municipality had interfered with the flow of the water.

The judgment of STREET, J., 10 O.L.R. 300, reversed. *Cummings v. The Corporation of the Town of Dundas*, 384.

### HUSBAND AND WIFE.

*Alimony—Wife Leaving Husband — Justification — Legal Cruelty — What Constitutes — Acts Affecting Mental Condition.*]—Legal cruelty, as regards the conjugal relationship, does not necessarily depend on physical acts or threats of violence, but may arise from acts or conduct operating entirely upon the mental condition of the aggrieved person.

Where therefore such a course of harsh conduct, treatment and intimidation on the husband's part towards his wife, a woman of delicate constitution, created such mental distress as was sufficient to, and did impair her health; and where his language of threats and menace, and his habitual demeanor, were such as to create a well-founded apprehension that the wife would suffer worse and more injurious treatment and hardship if she did not submit implicitly and submissively to anything the husband might choose to say or do:—

*Held*, that there was such matrimonial cruelty shewn as justified the wife leaving her husband, and entitled her to a judgment for alimony.

Judgment of the Divisional Court, 11 O.L.R. 547, affirmed. MEREDITH, J.A., dissenting. *Lovell v. Lovell*, 569.

### INFANT.

*Plaintiff, Next Friend of, Not Examinable for Discovery.*]—See DISCOVERY, 3.

*Capacity of, to be Guilty of Contributory Negligence is a Question for the Jury.*]—See RAILWAYS, 2.

### INSURANCE.

See FIRE INSURANCE — LIFE INSURANCE.

### INTEREST.

*Not Necessarily the Subject of a Special Endorsement.*]—See JUDGMENT.

*Not Necessarily a Matter of Right.*]—See PARLIAMENT.

### INTOXICATING LIQUORS.

*Local Option By-law—Omission of Essential Part — Quashing—Con. Mun. Act, 1903 (O.), secs. 204, 341 and 342.*]—The omission in a local option by-law of the time and place where the votes are to be summed up, as provided by secs. 341 and 342 of the Con. Mun. Act, 1903 (O.), is the omission of an essential part of and makes the by-law invalid, and sec. 204 of the Act does not apply to cure the defect, as such omission is more than an irregularity.

Judgment of ANGLIN, J., reversed. *Re Bell and the Municipal Corporation of the Township of Elma*, 80.

### JUDGE.

*Duty of, in Action for Malicious Prosecution.*]—See MALICIOUS PROSECUTION.

*Discretion of, in Depriving a Successful Defendant of his Costs.*]  
—See COSTS, 4.

*Jurisdiction of, in Division Court on the Interpretation of a Statute.*].—See PROHIBITION.

## JUDGMENT.

*Default of Appearance—Special Indorsement — Nullity — Irregularity—Account Stated—Interest on—Setting Aside Judgment—Terms—Signing and Entry of Judgments—Directing Issue—Judicature Act, secs. 113, 114—Con. Rules (1888) 245, 711, 764, 775; (1897) 138, 575, 628, 637.*].—The claim for interest on an account stated was not a proper subject of special indorsement under Con. Rule 245 of 1888, and is not under the present Con. Rule 138, inasmuch as an account stated does not of itself entitle the creditor to interest. Interest is not chargeable upon such an account unless a fixed time for payment was agreed upon or a demand for payment was subsequently made, or upon an account indorsed shewing that the parties have themselves in adjusting their accounts allowed interest upon balances outstanding, though a jury might and probably would allow such interest as damages.

A judgment signed for default of appearance to a writ, the indorsement upon which is not a special indorsement authorized by the rules of Court, would be a nullity and not merely irregular, and susceptible of cure by amendment, but by virtue of Con. Rule 711 of 1888, and now of Con. Rule 575 of 1897, notwithstanding such a claim for interest, final judgment may be rightly signed for

the liquidated demand upon the account stated, while as to the rest of the claim, the judgment should be interlocutory only; and if under these circumstances judgment for the whole claim has been entered, it is not a nullity but merely irregular, and terms may be rightly imposed on setting it aside:—

*Held*, also, that the requirements of Con. Rule 764 and 775 (1888) (*cf.* now Con. Rules 628 and 637, 1897) as to the signing and entry of judgments, were satisfied by the proper officer placing his signature upon the back of the judgment under the words "judgment signed October 6th, 1890," followed by a memorandum in the judgment book in his office signed by him, although he did not sign the judgment on its face.

The propriety of directing that a question as to the validity of a default judgment impugned because of alleged defects in the indorsement of claim upon the writ should be determined by the trial of an issue is open to grave doubt. *George v. Green*, 190.

*Declaratory.*].—See MUNICIPAL CORPORATIONS, 2.

## JURISDICTION.

*Of Police Magistrate.*].—See POLICE MAGISTRATE, 1.

*Of Surrogate Judge, to Set Aside his Own Order Induced by Fraud or Made by Mistake.*].—See SURROGATE COURTS, 1.

*Of a Division Court Judge on the Interpretation of a Statute.*].—See PROHIBITION.

## JURY.

1. *Negligence — Non-repair of Highway.*—Plaintiff's statement of claim, in an action for injuries sustained by falling into an open sewer dug in the street by the defendants, alleged that such injuries "were caused by the negligence of the defendants in not securely guarding said sewer, and making same safe for passengers using said street":—

*Held*, that the failure of the defendants to guard the excavation was non-repair within the meaning of sec. 104 of the Judicature Act, and a motion to strike out the jury notice was allowed. *Burns v. The Corporation of the City of Toronto*, 109.

2. *Trial in Toronto—Investigation of Accounts—Striking out Jury Notice.*—The practice where the venue in an action is laid out of Toronto is, except in rare cases, to leave the matter to be dealt with by the trial Judge; but in Toronto, where there are separate sittings for jury and non-jury cases, the latter being practically a continuous sitting throughout the year, the practice has been adopted, in order to prevent the jury list from being unduly encumbered, to strike out the jury notice in cases which properly ought to be tried without a jury.

In an action on a promissory note, which involved an investigation of accounts, and therefore properly triable without a jury, an order was made in Chambers directing such notice to be struck out. *Montgomery v. Ryan*, 297.

*To Find the Facts upon which Reasonable and Probable Cause Depends in Actions for Malicious Prosecution.*—See MALICIOUS PROSECUTION.

*Questions To.*—See MALICIOUS PROSECUTION.

*Finding of, that Some Warning Should be Given by a Railway in a Specific Case did not Infringe on Jurisdiction of Railway Commission.*—See RAILWAY, 2.

## JUSTICE OF THE PEACE.

See POLICE MAGISTRATE.

## LEASE.

*Oil Lands—Forfeiture Clause—Contract—Lease or License—Profit a Prendre — Construction.*—The defendant by written lease gave the plaintiff the exclusive right to drill on certain oil lands for five years from December 16th, 1903, "this lease to be null and void and on longer binding . . . if a well is not commenced . . . within six months, . . . unless the lessee shall thereafter pay yearly to the lessor \$50 per year for delay." No well had been begun by June 16th, 1904, when the first six months expired. On July 8th, 1904, the plaintiff paid the defendant \$50 by cheque, which the defendant cashed on August 10th, 1904, and receipted as "received on account of delay in beginning operations under the lease." In August, 1905, the plaintiff tendered the second yearly payment of \$50, which the defendant refused, having made another lease to his co-defendant on July 28th, 1905:—

*Held*, that the second payment of \$50 was in time, and might have been validly made at any time during the second year which did not terminate until December 16th, 1905.

The legal effect of the instrument in question was more than a



license: it conferred a profit a prendre, an incorporeal right to be exercised in the land comprised in it. *McIntosh v. Leckie et al.*, 54.

### LIFE INSURANCE.

*Assignment of Policy—Informal Assignment—Security for Debt—R.S.O. 1897, ch. 203, sec. 151 (5).*—The holder of a policy of insurance on his own life intending to secure payment of a loan to him, signed a document addressed to the lenders in which he stated: "For collateral security I have placed aside and assigned to you a policy of insurance in the Standard Life Assurance Company for \$2,000":—

*Held*, that the effect of the document was to give the equitable right and title to the policy to the lenders of the money as beneficiaries; and that other creditors could not claim as against them, for they could take no higher rights than the insured had at the time of his death. *Thomson & Avery v. Macdonnell*, 653.

### MAGISTRATE.

See POLICE MAGISTRATE.

### MALICIOUS PROSECUTION.

1. *Absence of Reasonable and Probable Cause—Functions of Judge and Jury—Disputed Facts—Nonsuit—New Trial—Judicature Act, sec. 112—Questions for Jury.*—In an action for malicious prosecution the jury is to find the facts on which the question of reasonable and probable cause depends, but the Judge must determine whether the facts found do constitute reasonable and prob-

able cause. The difficulty is in the determination of the question whether there are any facts in dispute upon which the jury should be asked to pass. In determining that the plaintiff has failed to shew absence of reasonable and probable cause, and withdrawing the case entirely from the jury, the Judge must assume in favour of the plaintiff all facts of which he has adduced any reasonable evidence.

Therefore, where the defendant had prosecuted the plaintiff for the theft of some lumber, and the plaintiff admitted taking the lumber, but swore that he had done so with the defendant's consent, in exchange for lumber of his own:—

*Held*, that it must be assumed that the exchange was actually made, and belief of the defendant, when laying the information, in the guilt of the plaintiff, necessarily implied his having forgotten that he had made such an exchange, and such forgetfulness not being admitted, was a question of fact for the jury, and so, too, the existence in the mind of the defendant of an honest belief in the plaintiff's guilt.

The plaintiff admitted that the defendant, before laying information, charged him orally with the theft of the lumber, and that he (the plaintiff) made no answer to the charge, no allusion to the exchange:—

*Held*, that these facts did not warrant an assumption by the trial Judge that the plaintiff's evidence as to the exchange was untrue, or his drawing an inference that, if any such exchange had in fact taken place, it had passed entirely from the defendant's mind.



Judgment of MABEE, J., nonsuiting the plaintiff set aside, and a new trial directed.

*Seemle, per* ANGLIN, J., that sec. 112 of the Judicature Act expressly prohibits the putting of questions to the jury in actions of this kind and of the other kinds specified therein. Suggestion of an amendment of this section. *Still v. Hastings*, 322.

2. *Criminal Charge—Settlement Out of Court—Termination of Proceedings.*—An action for malicious prosecution, founded upon criminal proceedings, cannot be maintained, where it appears that the termination of the prosecution was brought about by compromise or agreement of the parties.

The plaintiff was arrested and charged before a police magistrate with concealing and disposing of his property with intent to defraud his creditors, contrary to sec. 368 of the Criminal Code. After the plaintiff had been taken into custody, as the result of a suggestion, he gave up to the defendant certain moneys found on his person and gave his notes for the balance of the claim, and the prosecution was withdrawn, the police magistrate indorsing on the information "settled out of court":—

*Held*, that the plaintiff could not maintain an action for malicious prosecution.

*Wilkinson v. Howel* (1830), Moo. & M. 495, at p. 496, followed.

English and American cases reviewed.

Judgment of BOYD, C., reversed. *Baxter v. Gordon Ironsides & Fares Co., Ltd.*, 598.

## MASTER AND SERVANT.

*Negligence — Workmen's Compensation Act—R.S.O. 1897, ch. 160, sec. 13, sub.-sec. 5—Reasonable Excuse for Not Giving Notice—Release.*—Plaintiff, in the employment of the defendants, was, owing to their negligence, injured by the bursting of a blow pipe attached to a boiler in their mill. Defendants' manager knew of the accident the day it happened, and informed the chief engineer of a boiler insurance company in which defendants had an insurance policy. That official visited plaintiff during the third week of his confinement to bed, and in a friendly way told him he would pay him \$30 to cover three weeks' wages, but did not do so. Plaintiff was confined to his bed for eight weeks and his doctor's bill was \$125. During his illness he complained to the defendants' manager that the \$30 had not been sent to him, and the latter, acting apparently as a friend, said he would look into it. Subsequently the plaintiff returned to work with defendants, and while with them the insurance company sent \$30 to defendants' manager, who paid it over to the plaintiff and got him to sign a release of all claims. No notice was given by plaintiff to defendants as required by sec. 13, sub.-sec. 5, R.S.O. ch. 160, but the defendants were not prejudiced thereby.

*Held*, that by the conduct of the defendants, the plaintiff was thrown off his guard as to seeking legal advice, and he had reasonable excuse for not giving notice as required.

*Held*, also, on the evidence, that the plaintiff did not understand

the situation and did not intend to release the defendants from all liability: and judgment was entered for the plaintiff for the amount assessed by the jury, less the \$30.

Judgment of ANGLIN, J., at the trial reversed. *Smith v. McIntosh*, 118.

See NEGLIGENCE, 1, 3, 5.

### MECHANICS' LIEN ACT.

*Application of, to Railways.*—*See* CONSTITUTIONAL LAW, 1.

### MEDICAL PRACTITIONER.

1. "*Infamous and Disgraceful Conduct in a Professional Respect*"—*Medical Council*—R.S.O. 1897, ch. 176—*Erasure of Name from Register*—*Advertising Secret Remedy*—*Charge Merely Advertising, while Finding Deceitful and Fraudulent Advertising*—*Mistrial*—*Appeal to Divisional Court*—*Setting aside Finding.*—A charge was laid before the Medical Council under sec. 33 of the Ontario Medical Act. R.S.O. 1897, ch. 176, against a medical practitioner, that he was guilty of "infamous and disgraceful conduct in a professional respect," in advertising a secret remedy called "grip-pura," which the advertisement claimed would cure grippe or influenza, and would assist in curing a number of other diseases, while the finding against him was, that he was guilty of deceitful and fraudulent advertising, for which his name was ordered to be struck off the register:—

*Held*, on appeal to Divisional Court, under sec. 36 of the Act, that the order could not be sup-

ported, and must be set aside; and his name, if struck off, restored to the register.

What constitutes "infamous or disgraceful conduct in a professional respect," considered and commented on, as well as the evidence submitted with reference thereto, and the course pursued by the prosecution on the hearing of the charge. *Re Crichton*, 271.

2. *Ontario Medical Act*—"To Practise Medicine"—*Use of Drugs and other Substances*—*Construction*—*Reference by Lieutenant-Governor*—"Provincial Question"—R.S.O. 1897, ch. 84—*Ibid.* ch. 176, sec. 49.]—*Held* (MEREDITH, J.A., dissenting), that the words "to practise medicine" in sec. 49 of the Ontario Medical Act, R.S.O. 1897, ch. 176, cannot be construed except as concrete cases arise, further than in some such way as follows: if it were shewn that a person not registered under the Ontario Medical Act attempted to practise the cure or alleviation of disease by methods and courses of treatment known to medical science, and adopted and used in their practice by medical practitioners registered under the Act, or advised or prescribed treatment for disease or illness such as would be advised or prescribed by the registered practitioners—then, although what was done, prescribed or administered, did not involve the use or application of any drug or other substance having or supposed to have the property of curing or alleviating disease, he might be held to be practising medicine within the meaning of this section.

*Per* GARROW, J.A.:—A person may always do his own diagnosing,

and buy and use what he chooses (except certain poisons), upon himself. The patient may legally go, under such circumstances, not only to a druggist, but to the Christian Scientist, the osteopath, the medical electrician, the masseur, etc., and obtain and pay for the treatment which these persons give, so long as he does his own diagnosing and prescribing. So also *per* MACLAREN, J.A.

*Per* MEREDITH, J.A.:—The words "practise medicine" in sec. 49 should be given their primary and popular meaning, namely, practising the art of healing the sick by means of medicines or drugs.

*Held*, also (GARROW, J.A., doubting, and MEREDITH, J.A., dissenting), that a reference to this Court to determine the construction of the above section was competent to the Lieutenant-Governor in Council, under R.S.O. 1897, ch. 84, sec. 1, being "An Act for Expediting the Decision of Constitutional and other Provincial Questions."

Moss, C.J.O., and GARROW, J.A.:—Under such a reference as this, the Court is to be guided, in giving its opinion, by the settled decisions, and unless in the case of conflicting decisions, it is not to pronounce upon whether they ought or ought not to have been decided as they were. The decisions cannot be reviewed by the Court as if the reference was an appeal from them or any of them. *In re Ontario Medical Act*, 501.

## MINES AND MINERALS.

*Appeal from Mining Commissioner—Notice of—Parties Adversely Interested—Mines Act*,

1906, 6 *Edw. VII.*, ch. 11, sec. 75 (O.).]—Parties who, alleging the discovery of valuable ore, have staked out a claim and filed an application, are "parties adversely interested" as against one who has previously staked out a similar claim on the property and filed his application, within the meaning of sec. 75 of the Mines Act, 1906, respecting appeals to the Mining Commissioner from a decision of a Mining Recorder; and if notice of such appeal has not been duly filed and served upon them the appeal must be dismissed. *In re Petrakos*, 650.

## MISDIRECTION.

*In Withdrawing from a Jury Evidence of a Rule of a Street Railway Company to Shut Off Power on Approaching a Crossing.*]—See NEGLIGENCE, 4.

## MORTGAGE.

*Redemption—Priorities—Execution Creditors Proving Claims in Master's Office—Payment of Mortgagee's Claim—Subsequent Statutory Assignment by Mortgagor for Benefit of Creditors—Rights of Assignee—Assignments and Preferences Act*, sec. 11.]—Upon the usual reference under a judgment for foreclosure or redemption in an action upon a mortgage, four judgment creditors of the mortgagor having writs of *fi. fa.* lands in the sheriff's hands were added as parties in the Master's office, and proved claims upon their respective judgments. The Master made his report by which he found that they were the only incumbrancers, and appointed a day for payment by them of the amount found due to the plaintiffs as mortgagees. After confirmation of the report,



the respondent obtained assignments of the judgment, and was added as a party defendant by the Master's order. He then redeemed the plaintiffs by payment of the amount found due, and the Master took a subsequent account as between him and the mortgagor in respect of his claims on the mortgage and judgments, and appointed a day for payment by the mortgagor of the total amount. After confirmation of this report, and before the day named for payment, the mortgagor made an assignment for the benefit of his creditors under the Assignments and Preferences Act to the appellant, upon whose application an order was made adding him as a party, extending the time for redemption, and directing a reference back to the Master to take a new account and appoint a new day:—

*Held* (MEREDITH, J.A., dissenting), that, notwithstanding the provisions of sec. 11 of the Assignments and Preferences Act, the appellant was not entitled to redeem by payment of the amount due upon the mortgage only, and thus take priority of the respondent in respect of his claim upon the judgments.

*Per* OSLER, J.A.:—Before the assignment to the appellant, the respondent had acquired a new and independent status. By the adjudication of the Court he acquired a lien, charge, or incumbrance upon the lands, and the right as such incumbrancer to redeem the mortgagees—a right which he exercised before the appellant, *pendente lite*, acquired the equity of redemption by the assignment. Before this, too, his claims on the mortgage and judgments had been consolidated and his

right to be redeemed by the mortgagor, in respect of the whole, declared. An interest or charge of this nature is not affected by the Act.

*Baker v. Harris* (1810), 16 Ves. 397, applied.

Order of a Divisional Court affirmed. *Federal Life Assurance Co. of Canada v. Stinson et al.*, 127.

## MUNICIPAL CORPORATIONS.

1. *Local Option By-law—Voting on by Electors—Town Divided into Wards—Municipal Act, sec. 355—Objections to By-law.*—A by-law enacted under the local option provisions of the Liquor License Act, R.S.O. 1897, ch. 245, to prohibit the sale by retail of spirituous liquors within the municipality, was submitted for the approval of the electors of the municipality, as provided by sec. 141 of the Act, and was approved by a majority of 476. The municipality being a town divided into wards, it was objected that persons who were ratepayers in respect of property situate in different wards were not permitted to vote more than once on the by-law:—

*Held*, upon a consideration of the provisions of secs. 338 to 375, inclusive, of the Municipal Act of 1903, which are those referred to in sec. 141 of the Liquor License Act as prescribing the manner in which the vote is to be taken, that sec. 355 of the Municipal Act does not apply to such a by-law; and the objection mentioned and other objections to the by-law were overruled, MEREDITH, J.A., dissenting.

Decision of a Divisional Court, 12 O.L.R. 488, affirmed. *Re Sinclair and Town of Owen Sound*, 447.



2. *Street Railway—Acquisition of Land for Car-barns—Right of City to Expropriate—Action by Company Claiming Declaratory Judgment — Discretionary Power.*]

—The Toronto Railway Company, which has no powers of expropriation, acquired by purchase from the owners certain land in a residential locality, on which they proposed to erect car-barns, being a purpose authorized by the agreement with the city, as validated by 53 Vict. ch. 90 (O.), and submitted the plans to the city for its approval, whereupon a petition was presented to the Board of Control, by the residents of the locality, asking the intervention of the city against such proposed use of the land, as well as against the laying of tracks on certain streets as a means of access to the barns, which was referred to the corporation's counsel for his opinion as to the city's powers. The city had at that time under consideration the acquisition of a specified block of land in the locality for park purposes, but subsequently to the presentation of the petition the Parks and Gardens Committee recommended the expropriation of the company's land for such purpose, and under their instructions a by-law therefor was drafted by the city solicitor. On the matter coming before the council, the recommendation was struck out and the question of procuring park lands referred back to the committee, and on the following day, but after the plaintiffs had commenced this action, the architect was instructed by the board not to deal with the plans, pending the result of the proposed expropriation proceedings. There was nothing to shew that the course pursued by the city was not actuated by good

faith. In an action claiming a declaratory judgment of the company's right to so use the land:—

*Held*, that while there was undoubted power in the Court to grant declaratory judgments, it was a discretionary power; and that in this case, the exercise of the discretion by the trial Judge, in refusing to grant such a judgment, should not, under the circumstances, be interfered with.

Judgment of MEREDITH, C.J., at the trial, affirmed.

The right of a municipal corporation to exercise its expropriatory power discussed. *Toronto R.W. Co. v. City of Toronto*, 532.

*Liability of, for Acts of a Committee.*—See HIGHWAY, 2.

*Duty of, when Water Encroaches on and Destroys Land and Highway.*—See HIGHWAY, 4.

## MUNICIPAL DRAINAGE ACT.

*Trespass — Compensation—Proceedings by Action instead of by Notice.*—In an action brought against a township corporation and its contractor for damages caused by the variation of the specifications by the contractor for constructing a drain under the Municipal Drainage Act, R.S.O. 1897, ch. 226, in placing earth excavated in digging the drain upon the land of the plaintiff without permission:—

*Held*, that whether the plaintiff was entitled to be compensated or not her claim fell under sec. 93 of the above Act as amended, and her remedy was by notice and proceedings before the drainage referee as provided for by the said

section, and not by writ and proceedings in an action. *Burke v. The Corporation of the Township of Tilbury North*, 225.

### NEGLIGENCE.

1. *Injury to Person by Fault of Driver of Vehicle in Highway—Liability of Owner—Relation between Owner and Driver—Master and Servant or Bailor and Bailee—Inference from Facts—Duty of Appellate Court.*—The defendant, an hotel keeper, being the possessor of an omnibus and horses, made an agreement with M. whereby, in consideration of M. driving the defendant's guests free to and from the railway stations, and paying the defendant 70 cents a day for the board of the horses at the defendant's stables, M. should be entitled to the use of the omnibus and horses, and to take for his own use all sums which he could earn by conveying passengers other than the defendant's guests, and by carrying luggage. The plaintiff was injured upon the highway owing to the negligence of M., who was driving the omnibus empty to one of the stations to meet an incoming train:—

*Held*, that the question whether the relation between the defendant and M. was that of master and servant or that of bailor and bailee was a question of fact, and the test was the existence of the right of control as to anything not necessarily involved in the proper performance of the work undertaken by M. for the defendant; and (CLUTE, J., dissenting) that the proper inference from the above facts and other facts in evidence (set out in the judgments) was that the relationship

between the defendant and M. was that of bailor and bailee; and therefore the defendant was not responsible for the negligence of M.

*Saunders v. City of Toronto* (1899), 26 A.R. 265, followed.

There was no conflict of evidence, and the trial Judge drew inferences from the undisputed facts:—

*Held*, that an appellate court was at liberty (and *per* ANGLIN, J., was bound) to review the inferences of the trial Judge.

Judgment of the county court of Huron reversed. *Fleuty v. Orr*, 59.

2. *Street Railway—Piling Snow at Side of Track—Contributory Negligence—Plaintiff Putting Himself in Peril.*—An appeal by defendants from the judgment of the Divisional Court, reported 11 O.L.R. 56, was dismissed: MEREDITH, J.A., dissenting. *Preston v. Toronto R.W. Co.*, 369.

3. *Master and Servant—Death of Servant—Foreigner—Action for Benefit of—Right to Recover Damages.*—The administrator within this Province of a foreigner who was killed in an accident here through his employer's negligence is entitled, under the amendment to the Fatal Accidents Act, as embodied in sec. 2 of the R.S.O. 1897, ch. 166, to maintain an action on behalf of the deceased's family, foreigners residing out of Canada, for the recovery of damages sustained by reason of his death. *Gyorgy (Re Andrew Muszkulaki Estate) v. Dawson—Gyorgy (Re Joseph Gabor Estate) v. Dawson*, 381.

4. *Contributory Negligence—“Ultimate” Negligence—Street*

*Railway—Injury to Person Crossing Track—Neglect of Motorman to Shut off Power on Approaching Crossing—Rule of Company—Withdrawal from Jury—Misdirection.*—Negligence of a defendant incapacitating him from taking due care to avoid the consequences of the plaintiff's negligence, may, in some cases, though anterior in point of time to the plaintiff's negligence, constitute "ultimate" negligence, rendering the defendant liable notwithstanding a finding of contributory negligence of the plaintiff. Such anterior default of the defendant is "ultimate" negligence when it renders inefficient to avert injury to the plaintiff means employed by the defendant after danger became apparent, and which would otherwise have proved adequate to prevent the mischief, or renders the defendant wholly incapable of employing such means, though time was afforded for his using them efficaciously but for such disabling negligence.

*Scott v. Dublin and Wicklow R.W. Co.* (1861), 11 Ir. C.L.R. 377, approved.

*Radley v. London and North Western R.W. Co.* (1876), 1 App. Cas. 754, applied.

The plaintiff in crossing a city street in front of an approaching motor-car of the defendants was admittedly guilty of negligence or contributory negligence, but, on the evidence, would have crossed safely if a moment more had been allowed her. As it was, she was struck by the corner of the car fender and injured. There was evidence of a rule of the defendants that motormen were to shut off power at a certain distance before reaching a crossing, and that the motorman on this occasion did not do so, and in an action for

the defendants' negligence causing the plaintiff's injuries the trial Judge in his charge to the jury withdrew the evidence of this rule from their consideration:—

*Held*, that the place where the plaintiff attempted to cross was a crossing, being opposite a street running at right angles to the street upon which the car was being operated, though not an intersecting street; and the withdrawal of the evidence as to the rule was misdirection, and misdirection which might have affected the result; the jury might, upon the evidence, have found that, but for the motorman's failure sooner to shut off power, or to reduce speed, the momentum of the car would have been so lessened that he could, with the emergency appliance at his command, have avoided running down the plaintiff; and this failure, though anterior to the plaintiff's negligence, would be "ultimate" negligence, within the meaning of the rule which makes a defendant liable, notwithstanding contributory negligence of the plaintiff, if in the result he (the defendant) could by the exercise of ordinary care have avoided the mischief. *Brenner et al. v. Toronto R.W. Co.*, 423.

5. *Master and Servant—Defect in Machinery—Defective System of Inspection—Workmen's Compensation for Injuries Act—R.S.O. 1897, ch. 160, sec. 3, sub-sec. 1., sec. 6, sub-sec. 1.*]—On the trial of this action—which was against a railway company to recover damages for the death of the deceased through scalding by the escape of steam occasioned by the giving away of a water tube in a locomotive engine on which he was working—the jury, in answer



to questions submitted to them, which, with the answers to them, are set out in the report, found that the death was caused by a defect in the condition of the locomotive, "through the defendants not supplying proper inspection," the defect itself not being specified, but from a discussion which the trial Judge had with the jury when they brought in their answers, and from the answers to further questions submitted to them, such defect it appeared consisted in the fact that the end of the tube in question had not been sufficiently "belled" by one J., who had put the tube in the boiler:—

*Held*, that there was no evidence to support liability at common law, but that the evidence and findings of the jury sufficiently established what the defect was, and that J. was a person entrusted with the work, so that there was liability under the Workmen's Compensation Act, in respect of which the deceased's widow and administratrix could maintain the action, and was entitled to recover the damages assessed by the jury under the above Act.

MEREDITH, J.A., dissenting on the question of liability under the Act. *Schwob v. Michigan Central Railroad Co.*, 548.

*Of Common Carriers, where Delay.*—See CARRIERS.

See MASTER AND SERVANT.

## NEW TRIAL.

See BILLS OF EXCHANGE, 1.

*Ordered After Case Stated under sec. 743 of the Criminal Code.*—See CRIMINAL LAW.

## NEXT FRIEND.

*Of Infant Plaintiff not Examenable for Discovery.*—See DISCOVERY, 3.

## NOTICE.

*Of Action.*—See MASTER AND SERVANT.

*To an Insurance Company of Change Material to a Risk.*—See FIRE INSURANCE.

*Want of Notice of Appeal in Mining Case.*—See MINES AND MINERALS.

*Jury Notice for Trials in Toronto.*—See JURY, 2.

## OPTION.

*Want of Consideration in.*—See VENDOR AND PURCHASER, 3.

## PARENT AND CHILD.

*Conveyance of Farm by Father to Daughters—Agreement for Maintenance—Action to Set Aside Transaction—Understanding and Capacity of Grantor—Lack of Independent Advice—Absence of Undue Influence.*—A farmer, 77 years old, conveyed his farm to two of his daughters, subject to a charge for the maintenance of himself and his wife and of a money payment to another daughter. The evidence shewed that he understood what he was doing and approved of it afterwards till his death, four years later. This action was brought by one of his sons, after his death, to set aside the conveyance to the defendants, the two daughters:—

*Held*, that the transaction was a righteous one, and that the conveyance, being executed volun-



tarily and deliberately, with knowledge of its nature and effect, should not be set aside; the advice of an independent solicitor or other person was not a *sine quâ non*, it appearing that the transaction was not promoted or obtained by undue influence, and was in itself a reasonable one, having regard to all the circumstances.

Judgment of CLUTE, J., reversed. *Empey v. Fick et al.*, 178.

### PARLIAMENT.

*Provincial Legislature — Contract Authorized by Resolution of — Effect of — Modification of by Order - in - Council — Executive Government — Claim on — Effect of Decision of Court — Rights Under Contract.*]—The Government of the Province of Ontario, through its Inspector of Prisons, entered into a contract, authorized and approved of by a resolution of the Legislature, for the manufacture of twine in the Central Prison, utilizing prison labour, which contract was assigned to a company with the consent of the Lieutenant Governor-in-Council. After the assignment, and during the currency of the contract, the workshops and machinery were destroyed by fire and the work stopped. A new agreement with the company was then entered into, authorized by orders-in-council, but not approved of by the Legislature, for the furnishing new machinery, etc. On the trial of a petition of right, in which the company claimed balances as due after a termination of the contract:—

*Held*, that while a judgment of the Court would be wholly inoperative, so far as any payment

to the contractor of the amount found due was concerned, unless the Legislature should appropriate the money, the original agreement was within the authority of the Executive Government of the Province and did not require the ratification of the Legislature to give it contractual validity, and that the later agreement was a new agreement, which also was within the authority of the Executive Government, as well as any changes or modifications in either.

*Held*, also, on the evidence, that after accounts had been taken on a certain basis occasioned by a change in the contract, it was too late to re-open them.

2. That parties are not entitled to interest as of right, and as in the transactions between the parties here, interest was not charged by the Government, as they now sought to charge it, that claim could not be allowed.

3. That although insurance was not provided for in the agreement and the machinery was purchased by the company, it was subsequently to become the property of the Government, and so was substantially a purchase by the Government, and as insurance had been allowed to the company in the accounts, it was too late to object to such allowance now.

4. That accounts rendered, checked and entered in the prison books, there being no fraud or concealment, should not be disturbed.

5. That the contract did not call for the payment of additional men supplied beyond the original number contracted for, and there

was no implied contract for their payment as on a *quantum meruit*.

While not necessary to determine the case, the Court was of opinion that the resolution of the Legislature ratifying the contract did not give the contract the force of a statute of the Province, and there was no intention it should, and even if it did, that the Executive Government had power to modify it. *The Independent Cordage Company of Ontario, Limited, and His Majesty the King*, 619.

### PARLIAMENTARY ELECTIONS.

*Controverted Election—Scrutiny—Ruling of Trial Judge as to Disqualification of Class of Voters—Appeal to Court of Appeal—Jurisdiction—Finality of Voters' Lists.*]—Upon proceeding with the scrutiny consequent upon the judgment of the Court of Appeal, 12 O.L.R. 453, Teetzel, J., one of the Judges who tried the petition, made a general ruling to the effect that in cases of objection to votes on the ground that the persons who voted were under the age of twenty-one years or were aliens, although their names were on the voters' lists, he would receive evidence to shew minority or alienage, notwithstanding the provisions of the Voters' Lists Act declaring that upon a scrutiny the voters' lists shall be final and conclusive:—

*Held*, that no appeal lay to the Court of Appeal from such ruling.

*Per* MEREDITH, J.A., dissenting, that an appeal was competent and should be entertained and allowed and the ruling reversed. *Re Port Arthur and Rainy River Provincial Election (No. 3)*, *Preston v. Kennedy*, 17.

### PARTIES.

1. *Fraudulent Conveyance—Settlement of Plaintiff's Debt—Addition of New Creditor as Co-plaintiff—Con. Rules 206, 313.*]—Where a creditor, who has brought an action on behalf of himself and other creditors to vacate a transfer of property, has before judgment received payment of his debt, but not of his costs, the Court will not sanction the addition of another creditor as a co-plaintiff, but will allow the controversy to be settled as between the plaintiff and the defendants, leaving the creditor seeking to intervene to begin an independent action. *Driffill v. Ough*, 8.

2. *Company—Payment of Dividends Out of Capital—Action by Liquidator Against Directors—Claim of Relief Over Against Shareholders—Joinder of as Third Parties—Rule 209—Scope of.*]—In an action by the liquidator of an insolvent company against the directors, specifying several alleged illegal acts, amongst which was that of payment of dividends out of capital, the Master in Chambers, at the instance of two of the defendants, who claimed indemnity over against the shareholders for any amounts so paid, issued the usual third-party order, under Con. Rule 209, directing that two out of a large number of shareholders should be joined as third-party defendants, as a test case, but no order for their representing the class was obtained, though it was stated that if they appeared such order would be applied for. On appeal by the plaintiff and the third parties, to a Judge in Chambers, the order was set aside. An appeal therefrom by the defendants to a Divisional Court was dismissed, the plaintiff under-

taking that any moneys realized in the action would not be distributed without notice to the defendants and without leave therefor being obtained from the local Judge. *The London and Western Trusts Co. v. Loscombe et al.*, 34.

3. *Action Against Guarantors of a Promissory Note—Dispute Between Makers and Payee as to Amount Due—Adding Makers as Defendants.*—In an action against the guarantors of a promissory note for \$1,935.46, given by a company for machinery bought from the plaintiffs, it appeared that the company before the maturity of the note was claiming from the plaintiffs \$953.68 for breaches of the contract of sale, and it was alleged that when the note was given it was agreed that the exact amount should be adjusted during its currency. The defendants paid into Court \$1,195.01 as the amount justly due, and moved for an order adding the company as defendants:—

*Held*, that the defendants were entitled to the order. *Reid v. Goold*, 51.

#### PLAN.

*Dedication of Highway by.*—*See* HIGHWAY.

#### PLEADING.

*Joinder of Defendants—Election to Proceed Against.*—In an action brought against the Guelph and Goderich R.W. Co., the Canadian Pacific Railway, and the Canada Foundry Co., jointly, in which it was alleged that the plaintiff was employed by the Canadian Pacific Railway to work upon the construction of a line of railway being

constructed by the Canadian Pacific Railway under the name of the Guelph and Goderich R.W. Co., leased and operated by the Canadian Pacific Railway, on which the Canada Foundry Co. agreed to construct a steel bridge, and the plaintiff was ordered by his employers to assist in that work and did so; that “the defendants” undertook the placing of the necessary girders and the plaintiff assisted on his employers’ orders; that the work of placing the girders was so negligently done that he was injured; that the apparatus used, including the roadbed, was under the control of “the defendants”; that they were negligent in not providing a safe road-bed and efficient apparatus; that there were defects in the derrick and plan adopted, and that “the said accident happened by reason of the said negligence of the said defendants, and by reason thereof the plaintiff suffered the injuries herein complained of”:—

*Held*, that the statement of claim sufficiently alleged a joint cause of action, and the plaintiff was not bound to elect against which of the several defendants he would proceed. *Symon v. The Guelph and Goderich R.W. Co.*, 47.

#### POLICE MAGISTRATE.

*Jurisdiction in City and County—Subsequent Appointment of Salaried Police Magistrate for the County—Offence Committed in County Outside the City Limits—Jurisdiction.*—Motion to quash a conviction made by a police magistrate of a city, appointed under R.S.O. 1877, ch. 72, and afterwards appointed police magistrate for the county in which the city was situate, under 41 Vict.



ch. 4, sec. 9 (O.), for an offence committed in the county outside the city limits. A salaried police magistrate was subsequently appointed for the county under 48 Vict. ch. 17, sec. 1 (O.); R.S.O. 1887, ch. 72, sec. 8.

*Held*, that the conviction was good, as the later appointment was not "in the place and stead" of the first, and that the convicting magistrate had jurisdiction in both city and county.

*Per* BRITTON, J.:—The city police magistrate is *ex officio* a justice of the peace for the county, and could, as police magistrate, sitting alone, do anything that two justices of the peace sitting together could do. *Rex v. Spellman*, 43.

### PRIVIES.

See FACTORIES ACT.

### PRODUCTION.

*Of Books for Discovery.*]—See DISCOVERY, 1, 4.

### PROHIBITION.

*Division Courts—Interpretation of Statute—Jurisdiction.*]—Where it is necessary to interpret a statute, in order to find out whether the division court should decide the rights of the parties at all, then if the division court Judge misinterprets the statute and so gives himself jurisdiction to decide such rights, prohibition will lie; but if it be necessary to interpret a statute, simply to decide the rights of the parties, prohibition will not lie, however far astray the division court Judge may go.

*In re Long Point Company v. Anderson* (1891), 18 A.R. 401, followed. *Re The Corporation of the Township of Ameliasburg v. Pitcher et al.*, 417.

### PROMISSORY NOTES.

See BILLS OF EXCHANGE.

### PROVINCIAL LEGISLATURE.

*Effect of Resolution of and Orders in Council.*]—See PARLIAMENT.

*Powers of.*]—See CONSTITUTIONAL LAW, 2.

### PUBLIC SCHOOLS.

*Change of School Site—Meeting to Determine — Poll — Right of Farmers' Sons to Vote.*]—By the Public Schools Act, 1 Edw. VII. ch. 39, sec. 34 (O.), it is enacted that the trustees of every rural school section shall have power to select a site for a new school house, or to agree upon a change of site for an existing school house, and shall forthwith call a special meeting of the ratepayers of the section to consider the site selected by them; and no site shall be adopted, or change of site made except in the manner hereinafter provided, without the consent of the majority of such special meeting:—

*Held*, that there is power to hold a poll at such a meeting, and that at such polling persons entered on the assessment roll as "farmers' sons" are entitled to vote. *McFarlane v. Greenock School Trustees*, 220.



## RAILWAY.

1. *Injury to Person at Highway Crossing—Negligence—Findings of Jury—Train "behind Time"—Dominion Railway Act, 1903, sec. 215.*—In an action to recover damages for the death of a man who was struck by a train of the defendants at a highway crossing, the evidence as to whether the statutory signals were given was conflicting, and, while it was shewn that the train was about ten minutes late, there was no evidence as to the cause of the delay, nor was it shewn that the deceased was misled thereby. The jury found that the defendants were guilty of negligence, which consisted in the train being "behind time"; but they did not answer a question put to them as to whether the bell was ringing:—

*Held*, that no actionable negligence was shewn or found, and the action should be dismissed; it was not a case for a new trial.

Section 215 of the Dominion Railway Act, 1903, which requires that all regular trains shall be started as nearly as practicable at regular hours, fixed by public notice, did not aid the plaintiffs.

Judgment of *BOYD, C.*, reversed. *Hanly et al. v. Michigan Central R.W. Co.*, 560.

2. *Crossing in Town—Hand-car—Warning—Finding of Jury—Railway Committee Jurisdiction—Infant Plaintiff—Negligence—Contributory Negligence—By-law Against Coasting.*—A child of ten years of age was coasting down an incline on a street in a town crossed by a railway, and was run down and injured by a hand-car proceeding along the railway.

At the trial, the jury found in answer to questions, that the de-

fendants were negligent in not giving some warning in approaching the crossing; that the defendants could have avoided injuring the plaintiff by stopping the hand-car, and that it was their duty, apart from the provisions of the Railway Act, to have given warning:—

*Held*, that the jury, in finding that warning should have been given, were not assuming to lay down any general rule as to what care or precaution should be taken, but simply that under the circumstances some warning should have been given, and that the answer was unobjectionable and in no way infringed upon the jurisdiction of the Railway Commission.

*Held*, also, that even if a hand-car is not a train, a warning is necessary apart from the Railway Act.

*Held*, also, that although there was a municipal by-law prohibiting coasting, the plaintiff had not been notified as required by the by-law, and the onus was on the defendants to prove criminal capacity at common law and under the Code of an infant under fourteen, and the defendants were not entitled to invoke such by-law for another purpose.

*Held*, lastly, that although a defendant is not liable if the injury is caused entirely by an infant's own negligence, the capacity of the infant to be guilty of contributory negligence is a question for the jury, and that as the plaintiff was not a trespasser and was where he had a right to be, and had not been notified under the provisions of the by-law, or his capacity for crime shewn, the

whole case was properly submitted to the jury. *Burtch v. The Canadian Pacific Railway*, 632.

### RECITAL.

*In Deed, Over Twenty Years Old.*]—See VENDOR AND PURCHASER, 1.

### REDEMPTION.

*Of Mortgage by execution Creditor of Mortgagor.*]—See MORTGAGE, 1.

### RECORDER.

*Mining.*]—See MINES AND MINERALS.

### REFERENCE.

*Solicitor-Master—Acceptance by Master of Retainer from one of the Parties — Disqualification — Setting Aside Reference.*]—The firm of solicitors in which a local Master was a partner had accepted, pending a reference before the latter, a retainer from the defendant for some non-contentious business in the Surrogate Court:—

*Held*, that the reference and proceedings thereon must be set aside, for, without suggesting that there had been or would be any bias, the Master, as the solicitor even in a small matter for the defendant, a man of large business interests, might reasonably be suspected of bias.

Judgment of ANGLIN, J., affirmed. *Livingston v. Livingston*, 604.

### RULES.

Con. Rule (1888) 245.]—See JUDGMENT.

Con. Rule (1888) 711.]—See JUDGMENT.

Con. Rule (1888) 764.]—See JUDGMENT.

Con. Rule (1888) 775.]—See JUDGMENT.

Con. Rule (1897) 138.]—See JUDGMENT.

Con. Rule 206.]—See PARTIES, 1.

Con. Rule 209.]—See PARTIES, 2.

Con. Rule 313.]—See PARTIES, 1.

Con. Rule 425.]—See COSTS, 3.

Con. Rule 439.]—See DISCOVERY, 3.

Con. Rule 440.]—See DISCOVERY, 3.

Con. Rule 442.]—See DISCOVERY, 2.

Con. Rule 462.]—See DISCOVERY, 2.

Con. Rule 575.]—See JUDGMENT.

Con. Rule 628.]—See JUDGMENT.

Con. Rule 637.]—See JUDGMENT.

Con. Rule 642.]—See SURROGATE COURTS.

Con. Rule 666.]—See EXECUTORS AND ADMINISTRATORS.

Con. Rule 667.]—See EXECUTORS AND ADMINISTRATORS.

Con. Rule 938 (d).]—See TRUSTS AND TRUSTEES.

Con. Rule 972.]—See DEVOLUTIONS OF ESTATES ACT.

Con. Rule 1130.]—See COSTS, 4.

Con. Rule 1132.]—See COSTS, 3.

Con. Rule 1133.]—See COSTS, 3.

Con. Rule 1178.]—See COSTS, 1.

**SCHOOLS.**

*See* PUBLIC SCHOOLS.

**SPECIFIC PERFORMANCE.**

*See* VENDOR AND PURCHASER,  
1, 2, 3.

**STATUTES.**

*Force of, Not Given to a Contract, by a Resolution of the Legislature.--See* PARLIAMENT.

30 & 31 Vict. ch. 3 (Imp.) (B.N.A. Act), sec. 92, sub-sec. 2.....  
*See* CONSTITUTIONAL LAW, 2.

41 Vict. ch. 4, sec. 9 (O.).....  
*See* POLICE MAGISTRATE.

48 Vict. ch. 17, sec. 1 (O.).....  
*See* POLICE MAGISTRATE.

53 Vict. ch. 90 (O.).....  
*See* MUNICIPAL CORPORATIONS, 2.

55 & 56 Vict. ch. 29 (The Criminal Code), secs. 684, 742, 743 (D.)....  
*See* CRIMINAL LAW.

55 & 56 Vict. ch. 29 (The Criminal Code), sec. 368.....  
*See* MALICIOUS PROSECUTION, 2.

R.S.O. 1877, ch. 72, sec. 8.....  
*See* POLICE MAGISTRATE.

R.S.O. 1887, ch. 152, sec. 62.....  
*See* HIGHWAY, 1.

R.S.O. 1897, ch. 51 (The Judicature Act), sec. 58, sub-sec. 5.....  
*See* DAMAGES, 2.

R.S.O. 1897, ch. 51, sec. 104.....  
*See* JURY, 1.

R.S.O. 1897, ch. 51, sec. 112.....  
*See* MALICIOUS PROSECUTION, 1.

R.S.O. 1897, ch. 51, secs. 113 and 114.  
*See* JUDGMENT.

R.S.O. 1897, ch. 55, sec. 51.....  
*See* COUNTY COURTS.

R.S.O. 1897, ch. 59, sec. 72.....  
*See* EXECUTORS AND ADMINISTRATORS.

R.S.O. 1897, ch. 62, secs. 2, 3, 6, 10...  
*See* ARBITRATION AND AWARD.

R.S.O. 1897, ch. 84.....  
*See* MEDICAL PRACTITIONER, 2.

R.S.O. 1897, ch. 109, sec. 11.....  
*See* COSTS, 2.

R.S.O. 1897, ch. 127, sec. 14, sub-sec. 5.  
*See* DEVOLUTION OF ESTATES ACT.

R.S.O. 1897, ch. 134 (Vendors and Purchasers Act), sec. 2 (1).....  
*See* VENDOR AND PURCHASER, 1.

R.S.O. 1897, ch. 147, sec. 3, sub-sec. 1.  
*See* BANKRUPTCY AND INSOLVENCY.

R.S.O. 1897, ch. 147, sec. 11.....  
*See* MORTGAGE.

R.S.O. 1897, ch. 153.....  
*See* CONSTITUTIONAL LAW, 1.

R.S.O. 1897, ch. 157, secs. 3 and 4....  
*See* DISCOVERY, 1.

R.S.O. 1897, ch. 160, sec. 3, sub-sec. 1,  
sec. 6, sub-sec. 1.....  
*See* NEGLIGENCE, 5.

R.S.O. 1897, ch. 160, sec. 13, sub-sec. 5.  
*See* MASTER AND SERVANT.

R.S.O. 1897, ch. 166, sec. 2.....  
*See* NEGLIGENCE, 3.

R.S.O. 1897, ch. 176, sec. 33.....  
*See* MEDICAL PRACTITIONER, 1.

R.S.O. 1897, ch. 176, sec. 36.....  
*See* MEDICAL PRACTITIONER, 1.

R.S.O. 1897, ch. 176, sec. 49.....  
*See* MEDICAL PRACTITIONER, 2.

R.S.O. 1897, ch. 203, secs. 151 (5),  
*See* LIFE INSURANCE.....

R.S.O. 1897, ch. 203, sec. 168 (3),  
*See* FIRE INSURANCE.....

R.S.O. 1897, ch. 224 (The Assessment Act), secs. 13, 29, 34, 152, 176 and 218.....  
*See* ASSESSMENT AND TAXES, 1.

R.S.O. 1897, ch. 226, sec. 9, sub-sec. 8.  
*See* DRAINAGE.

R.S.O. 1897, ch. 226, sec. 93.....  
*See* MUNICIPAL DRAINAGE ACT.

R.S.O. 1897, ch. 336, secs. 2 and 4....  
*See* TRUSTS AND TRUSTEES.

R.S.O. 1897, ch. 245 (The Liquor License Act), sec. 141.....  
*See* MUNICIPAL CORPORATIONS, 1.



- R.S.O. 1897, ch. 256, sec. 2, sub-sec. 1 (e).....  
*See* FACTORIES ACT.
- 62 Vict. ch. 15, sec. 3 (O.).....  
*See* TRUSTS AND TRUSTEES.
- 62 Vict. (2) ch. 28, sec. 6 (O.).....  
*See* DRAINAGE.
- 63 Vict. ch. 17, sec. 18 (O.).....  
*See* EXECUTORS AND ADMINISTRATORS.
- 63 Vict. ch. 24 (O.).....  
*See* CONSTITUTIONAL LAW, 2.
- 1 Edw. VII. ch. 39, sec. 34 (O.).....  
*See* PUBLIC SCHOOLS.
- 3 Edw. VII. ch. 19 (The Municipal Act, 1903), secs. 338 to 375 (O.)..  
*See* MUNICIPAL CORPORATIONS, 1.
- 3 Edw. VII. ch. 19, secs. 204, 341, 342 (O.).....  
*See* INTOXICATING LIQUORS.
- 3 Edw. VII. ch. 58 (Dominion Railway Act), sec. 215.....  
*See* RAILWAY, 1.
- 4 Edw. VII. ch. 23, sec. 36, sub-sec. 3 (O.).....  
*See* ASSESSMENT AND TAXES, 2.
- 4 Edw. VII. ch. 26, sec. 3 (O.).....  
*See* FACTORIES ACT.
- 5 Edw. VII. ch. 14 (O.).....  
*See* EXECUTORS AND ADMINISTRATORS.
- 6 Edw. VII. ch. 11, sec. 75 (O.).....  
*See* MINES AND MINERALS.

## SUPREME COURT OF CANADA.

*Leave to Appeal — Special Grounds — Dissenting Judgments.*]  
 —Leave to appeal to the Supreme Court of Canada from the judgment of the Court of Appeal, *ante* 569, was refused, the majority of the Court holding that it was not necessary to consider, upon an application for leave, the question whether an appeal would lie without leave, and being of opinion

that no special reasons were shewn for granting leave, the circumstance that out of the nine Judges of the Provincial Courts who heard the case two dissented from the opinion of the majority, not being a special ground.

MEREDITH, J.A., dissenting, was of opinion that an appeal lay without leave, and therefore the Court of Appeal had no jurisdiction to entertain the application for leave; but that, if there were jurisdiction, the leave should be granted. *Lovell v. Lovell*, 587.

## SURROGATE COURTS.

*Taking Accounts—Jurisdiction to Rescind Order on Account of Mistake—Con. Rule 642.*]—A surrogate Judge acting as the surrogate court has inherent jurisdiction to set aside an order which he has been induced to make by fraud of the applicant, and also to set aside or vary an order which he has made by mistake, though not to correct errors made in the judicial determination by him of any question; thus in this case it was held that he had jurisdiction to vacate an order made by himself upon the taking of executors' accounts and to reopen the accounts and further investigate them without reference to the order made.

The acts of the surrogate Judge in passing accounts of executors are those of the Court and not of the Judge as *persona designata*.

Consolidated Rule 642, which substitutes a proceeding by petition for the practice of filing certain kinds of bills abolished by the General Order of 1853, does not apply to a petition to a surrogate Judge to vacate an order made by him on the passing of executors'



accounts, but must be confined to cases in which under the former practice such relief as is mentioned in it could be obtained by one or other of such bills. *In re Wilson and Toronto General Trusts Corporation*, 82.

### THIRD PARTIES.

See PARTIES.

### TORONTO.

*Trials at—Jury and Non-Jury—Practice as to Jury Notice.*—See JURY, 2.

### TRADE MARK.

*Infringement—Coined Word—Similarity—Colourable Imitation—Costs.*—The judgment of Mulock, C.J. Ex.D., 11 O.L.R. 450, dismissing without costs an action to restrain the defendants from using the coined word "Stazon" to describe their eye glasses, in alleged infringement of the plaintiffs' registered trade mark "Shur-On," was affirmed on appeal. *Kerstein et al. v. Cohen et al.*, 144.

### TRIALS.

*At Toronto—Jury and Non-Jury.*—See JURY, 2.

### TRUSTS AND TRUSTEES.

*Trustee de son Tort—Infant Cestui que Trust—Illegal Disposition of Fund—Payment into Court—Jurisdiction.*—Moneys payable to a widow as trustee for her infant child were collected for her by M., and by arrangement between them retained by him and employed in his business. By writing addressed to the widow he ac-

knowledge holding the moneys to the credit of the infant, "bearing interest at the rate of six per cent. per annum" :—

*Held*, that M. was a trustee *de son tort*, and as such either an express or a constructive trustee, and liable to account to his infant *cestui que trust*, and so entitled to come to the Court, under the Trustee Relief Act, R.S.O. 1897, ch. 336, sec. 4 (and sec. 2, defining "trustee"), and obtain an order allowing him to pay the moneys into Court, against the opposition of the widow, who pressed for payment to her, on the ground that he was simply her debtor.

*Semble*, also, *per* ANGLIN, J., that the Court had jurisdiction, as custodian of the interests and property of infants, to order, *motu proprio*, that which, upon application of the official guardian or of the infant by her next friend, it could and would direct, by virtue of Rule 938 (d); and further, if the widow had resided abroad for a year and was resident abroad when the application for payment in was launched, the order might be made under 62 Vict. ch. 15, sec. 3 (O.).

Order of MABEE, J., affirmed. *Re Preston*, 110.

*Execution of.*—See WILL, 1.

### VENDOR AND PURCHASER.

1. *Contract for Sale of Land—Specific Performance—Title—Recital in Deed More than Twenty Years Old—Evidence—Onus of Proof—R.S.O. 1897, ch. 134, sec. 2 (1).*—A deed more than twenty years old, by which certain lands were conveyed to the grantee in

fee, contained the recital that the grantee was the administrator of his father's estate, and that the land was conveyed to him in satisfaction and discharge of a debt due to his father. It appeared that some four years prior to the date of the deed letters of administration *ad litem* had been granted by a surrogate court to the father's widow. In an action brought for specific performance of a contract for the sale of the said land:—

*Held*, that such recitals were sufficient evidence of the facts so recited, and were not displaced merely by the fact of the prior grant of administration to the widow for a stated limited purpose.

Judgment of TEETZEL, J., at the trial, affirmed. *Gunn v. Turner*, 158.

2. *Contract for Sale of Land—Specific Performance — Correspondence — Offer — Quasi-acceptance — Agent.*]—The defendant, the owner of land in Ontario, being abroad, arranged with an estate agent to send him any offers of purchase which he might receive. The plaintiff filled up and signed a printed form offering \$13,000, naming terms of payment and other details. This was sent by the agent to the defendant, who refused it. The plaintiff then signed another offer of \$14,000, on a similar form, half cash, balance payable by instalments, offer to be accepted by a certain day, and sale to be completed by a certain day. This was sent by the agent to the defendant, who, upon receiving it, wrote to the agent a letter in which he intimated that he would take \$14,000 in cash. In reply the agent, on instruc-

tions from the plaintiff, wrote to the defendant informing him that the plaintiff accepted the terms and would pay the \$14,000 in cash. On receipt of this letter, the defendant drew up an offer at \$14,000, containing the same terms, but changing the date for acceptance and for closing, and forwarded it for engrossment and for signature by the plaintiff. This was engrossed and then signed by the plaintiff and sent to the defendant, who then wrote to the agent declining to accept it:—

*Held*, in an action for specific performance, that no contract binding upon the defendant could be made out from the documents and correspondence.

*Harvey v. Facey*, [1893] A.C. 552, followed.

Judgment of TEETZEL, J., reversed. *Bohan v. Galbraith*, 301.

3. *Contract for Sale of Land—Specific Performance—Option—Absence of Consideration—Right to Withdraw Before Acceptance—Company—Notice of Withdrawal.*]—An option by the defendant, for which he received no consideration, was given to a company on two parcels of land, and contained the statement that "this offer is open and irrevocable for six months from the date hereof." Before the option expired, it not having been in the meantime accepted, the defendant handed to the company's secretary a letter addressed to him by name, but not designating him as such, stating that the option was withdrawn. The secretary, while intimating that he did not think the plaintiff had the power to withdraw, stated that there would shortly be a meeting of the company, when the option would

likely be accepted. The company met and accepted the option for both lots, which they assigned over to the plaintiff, who brought an action for specific performance of the alleged agreement to sell:—

*Held*, that the action was not maintainable, for there being no consideration for the option, the defendant had the right to withdraw it.

*Held*, also, that the letter of withdrawal must be deemed to have been given to and received by the secretary in his capacity of secretary. *Carton v. Wilson*, 412.

### VOTERS.

*Right of Farmers' Sons on Assessment Roll to Vote on Question of Change of School Site.*—See PUBLIC SCHOOLS.

### VOTERS' LISTS.

*Scrutiny of Minors or Aliens on Lists.*—See PARLIAMENTARY ELECTIONS.

### WATER AND WATER-COURSES.

*Navigable Rivers—Non-navigability of Portions—Riparian Proprietors—Doctrine of ad medium filum aquæ—Right of the Crown to Bed of River—Arbitration and Award—Directions to Arbitrators.*—The restriction of the presumption of the common law, as administered in England, in favour of Crown ownership of the *alveus* of navigable waters, for the protection of public rights of navigation and fishery therein, to navigable tidal waters, is apparently due to the non-recognition in early times of the necessity of protecting

such public rights in other navigable waters, and an acquiescence in the right of riparian owners of lands bordering thereon to the bed of such waters, *ad medium filum aquæ*; whereas in this Province such public rights in all rivers navigable in fact have been deemed always existent in the Crown, *ex jure naturæ*, so that the title in the bed thereof remained in the Crown after it had made grants of lands bordering upon the banks of such rivers, the doctrine of *ad medium filum aquæ* not applying thereto.

Where a river is navigable in its general character, natural interruptions to navigation at some parts of it, which can be readily overcome, do not prevent it from being deemed a navigable river at such parts.

The Winnipeg river, which flows from the Lake of the Woods to Lake Winnipeg, is a navigable river, and although there are interruptions to navigation in it, they can be readily overcome by means of canals, or other artificial means. The channel just below the town of Kenora, which contains one of these interruptions, is properly part of the river, and must be deemed navigable in the sense mentioned, so that the bed thereof remains vested in the Crown, and nothing in the Crown grants to the plaintiffs of lands bordering upon such branch, nor in their rights as riparian proprietors, interferes with the title of the Crown to the bed, or gives to the plaintiffs any title thereto or interest therein, *ad medium filum aquæ*.

The basis upon which damages were to be assessed to the plaintiffs as owners of lands on the banks of a navigable river are set



out in the report, the actions ultimately becoming actions to settle the rights of the parties, and to obtain directions to the arbitrators in expropriation proceedings. *Keewatin Power Co. v. Town of Kenora, and Hudson's Bay Co. v. Town of Kenora*, 237.

### WAY.

*Public Lane—Strip of Land Adjoining Used as Part of—User as One of the Public—Easement.*—To constitute a legal possession of land, not only must there be a corporeal detention, or that quasi detention, which, according to the nature of the right, is equivalent thereto, but also the intention to act as owner of the land; no legal possession is acquired by the exercise of a supposed right as one of the public.

The rear portions of the plaintiff's and the defendant's lands abutted on a public lane, a strip of land between the fence erected on defendant's land and the boundary of the lane being unenclosed. The plaintiff, for over 20 years, believing this strip to be a part of the lane, had been accustomed to drive over it to get to his stable, doing so in the exercise of a supposed right as one of the public, and not as an easement to his land:—

*Held*, that he had not acquired any right to use the strip. *Adams v. Fairweather*, 490.

### WILL.

1. *Construction — Trust—Precatory Trust — Power — Execution of.*—A testator whose mother owned an estate for life in a farm in which he had the remainder in fee, by his will devised to her his

interest in the farm "to be disposed of as she may deem most fit and proper for the best interest of my brothers and sisters." The mother after his death conveyed the farm in fee simple to one of his sisters, the expressed consideration being one dollar and natural love and affection, and the deed containing no reference whatever to the will, or anything indicating on its face that it was executed in pursuance of a power or trust:—

*Held*, that it was not necessary to determine whether the mother took absolutely, or whether, if she had not taken absolutely, a trust was created or a power, inasmuch as even if a trust was created in the mother, the conveyance by her operated, and was intended to operate, as an execution of the trust, although the whole of the property was granted to one daughter only. *Pettypiece v. Turley*, 1.

2. *Devise to Two Persons—Death of One Before Testator—Lands and Personality — Lapse — Residue—Tenants in Common—Joint Tenants—Survivorship.*—A testator, by his will, amongst other provisions, devised certain land to two sisters, naming them, to whom he also gave his residuary estate. One of the sisters predeceased the testator:—

*Held*, that as regards the land, the sisters would have taken as tenants in common, and therefore as to the deceased sister's share there was a lapse and it was undisposed of, but as to the personality they would have taken as joint tenants, and the survivor took the whole. *Re Gamble*, 299.

3. *Restraint on Alienation—Devise in Fee—Restriction Against*



*Devisee Mortgaging or Selling During His Lifetime.*—A testator by his will devised certain land to his "son H. P., his heirs and assigns, to have and to hold to said H. P., his heirs and assigns; for his and their sole and only use forever, subject to the condition that the said H. P. shall not during his lifetime either mortgage or sell (the land) thus devised to him:—

*Held*, that the restraint on alienation, being limited, was good.

Judgment of BRITTON, J., affirmed. *Re Porter*, 399.

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#### WORDS.

"*At this Office.*"—See CARRIERS.

"*Behind Time.*"—See RAILWAY, 1.

"*Belled.*"—See NEGLIGENCE, 5.

"*Employed.*"—See FACTORIES ACT.

"*Factory.*"—See FACTORIES ACT.

"*Good Cause.*"—See COSTS 4.

"*Infamous and Disgraceful Conduct in a Professional Respect.*"—See MEDICAL PRACTITIONER, 1.

"*Owner.*"—See FACTORIES ACT.

"*Parties Adversely Interested.*"—See MINES AND MINERALS.

"*Recklessly and Negligently.*"—See DISCOVERY, 4.

"*To Practice Medicine.*"—See MEDICAL PRACTITIONER, 2.

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